TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]95

THE UNITED STATES OF AMERICA ON THE RELATION OF VERDINE R. HALL, PLAINTIFF IN ERROR,

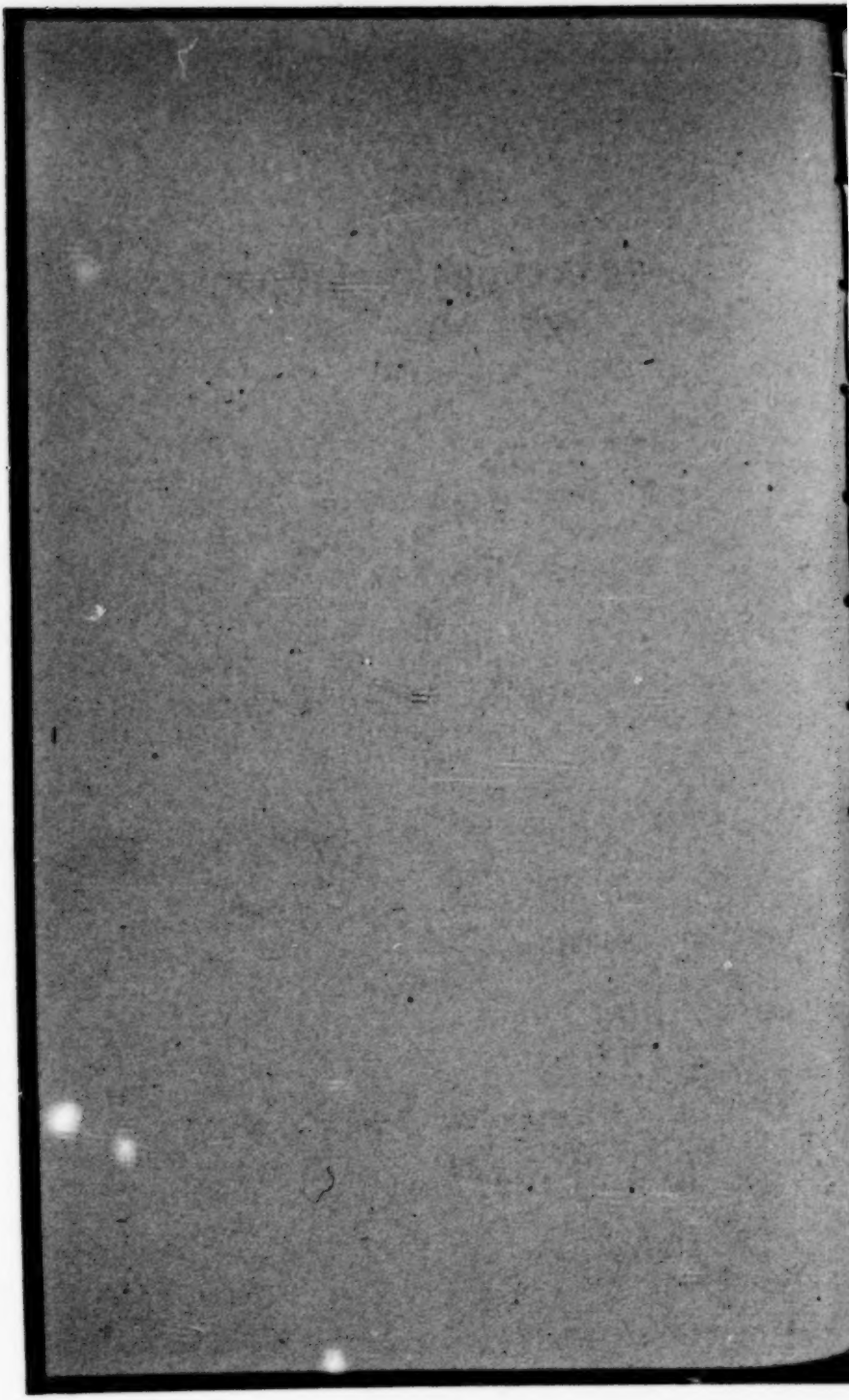
vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 11, 1919.

(27,061)



(27,061)

SUPREME COURT OF THE UNITED STATES.

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No. 349.

THE UNITED STATES OF AMERICA ON THE RELATION OF VERDINE R. HALL, PLAINTIFF IN ERROR,

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1 Court of Appeals of the District of Columbia.

No. 3196.

THE UNITED STATES OF AMERICA on the Relation of VERDINE R. HALL, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Supreme Court of the District of Columbia.

At Law. No. 59941.

THE UNITED STATES OF AMERICA on the Relation of VERDINE R. HALL, Plaintiff,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition for Mandamus.

Filed January 29, 1917.

In the Supreme Court of the District of Columbia.

At Law. No. 59941.

THE UNITED STATES OF AMERICA on the Relation of VERDINE R. HALL

v.

FRANKLIN K. LANE, Secretary of the Interior.

To the Supreme Court of the District of Columbia:

Your petitioner, Verdine R. Hall, respectfully represents:

I. That he is a citizen of the United States and of the State of Montana, and resides in said state.

2 II. That the respondent, Franklin K. Lane, is a citizen of the United States, temporarily residing in the District of Columbia, and is the Secretary of the Interior of the United States, duly qualified and acting as such.

III. That your petitioner is over the age of twenty one years and was on the 5th day of June 1915, and has been at all times thereafter and is now, qualified to make a valid settlement and entry under the homestead laws of the United States, and has been continually from the 5th day of June, 1915, and is now, residing upon and cultivating the tract of public land of the United States hereinafter described, all of which your petitioner has heretofore caused to be made known to the Secretary of the Interior in the form and manner required by the practice before the Department of the Interior for the presentation and prosecution of claims to the public lands before that Department.

IV. That on the 10th day of March 1910 that certain parcels of public land of the United States now known as the South Half of Section Eighteen, Township thirty-seven north, Range forty-three East, Montana Meridian, Montana, within the Glasgow land district, together with other then un-surveyed lands, comprised in entire townships and aggregating about four hundred thousand acres of the public domain in said state, were withdrawn and reserved from appropriation and disposal under the general land laws from and after said date and until the expiration of sixty days from date of filing in the office of the Register and Receiver of the United States Land Office at Glasgow, Montana, of the approved plats of the surveys of such lands. That such withdrawal and reservation was made and effected in accordance with and in pursuance of the act of Congress of August 18, 1894 (28 Stat. 394) which is in terms, as follows:

"That it shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several Acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor-General of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the Surveyor-General shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such town-ship or town-ships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expira-

tion of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands. And provided further, That the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided: And provided further, That the governors of the several States herein named are authorized to advance money from time to time for the survey of the townships withdrawn at such United States depository as may be designated by the Commissioner of the General Land Office, and the moneys so advanced shall be reimbursable. The foregoing provisions shall be applicable to Utah when admitted as a State into the Union and a governor is duly inaugurated and acting."

V. That the approved plat of the survey of said township thirty-seven North, Range forty-three East, Montana Meridian, Montana, was filed in the office of the Register and Receiver at Glasgow, Montana on the 17th day of May, 1915. From that date, and for a period of sixty days thereafter, all the land in said township was in a state of withdrawal and reservation from disposal under general laws, as expressly provided in said act of August 18, 1894, and was during the said period of sixty days subject only to the exclusive right of selection by the state of Montana, as also expressly provided in said act. That the said period of sixty days did not terminate or expire until the beginning of the 17th day of July, 1915.

VI. That the said South Half of Section Eighteen, Township Thirty-seven North, Range Forty-three East, Montana Meridian, Montana, was not selected by the state of Montana during the sixty day period from and after the date, to wit, May 17, 1915, of filing of the approved plat of the survey of said township nor has it ever been selected by said state.

VII. That at the moment of the beginning of the 17th day of July, 1915, and for a period extending from the 5th day of June 1915, your petitioner was actually inhabiting, by actully residing

upon, the said South Half of Section Eighteen, Township Thirty-seven North, Range Forty-three East, Montana Meridian, Montana and was inhabiting, and residing upon, said tract of public land with the bona fide intention and purpose of appropriating and entering the same under the homestead laws of the United States in the event that the State of Montana did not select said tract of land within the said period of sixty days from and after the date of filing of the approved plat of survey of the township, all of which your petitioner has heretofore caused to be made known to the Secretary of the Interior by affidavit prepared and submitted to said Secretary in the form and manner required by the practice before the Department of the Interior in the matter of the presentation and prosecution of claims to the public lands before that Department.

VIII. That on the 17th day of July 1917, and at 9 a. m. of that date, your petitioner filed in the office of the Register and Receiver of the United States Land Office at Glasgow, a duly executed and legally perfect application to make entry of said South Half of Section Eighteen, Township Thirty-seven North, Range Forty-three East, Montana Meridian, Montana, under the homestead laws of the United States, and did thereafter, and on the 23rd day of July 1915, file in said land office his affidavit, corroborated by five witnesses, alleging the beginning of actual residence upon the said land on June 5, 1915 and the purchase on the 4th of June 1915 of timber for the construction of a house upon said land, and did thereafter file in the General Land Office and in the office of the Secretary of the Interior his corroborated affidavit alleging the continuance and maintenance of such inhabitancy and residence all of which was done in due accordance with the practice of the Land Department of the United States in the matter of the assertion and prosecution of claims to the public lands before that Department.

IX. That your petitioner did not file his application to make homestead entry of said land before the 17th day of July, 1915 for the reason, and owing to the fact, that in the express terms of said act of August 18, 1894 the homestead laws were not applicable to said land at any time between the 10th day of March 1910, when the withdrawal and reservation provided for by said act began, and the 17th day of July, 1915 when such withdrawal and reservation ceased and terminated, all of which he has caused to be made known to the Secretary of the Interior heretofore and in the manner prescribed by the Department of the Interior for the presentation and prosecution of claims to the public lands before that department.

X. That your petitioner did not file his application to make homestead entry of said land before the 17th day of July 1915 for the additional reason, and owing to the additional fact, that on the 12th day of April 1915 the Register and Receiver at Glasgow, Montana, acting in due accordance with instructions from the General Land Office and the Secretary of the Interior at Washington and in con-

formity to the meaning of the said act of August 18, 1914 as then interpreted by the Department of the Interior, such interpretation being consistent with the interpretation placed upon the said act by the said Department for more than twenty years, gave public notice over their signatures to the people of Montana that none of the lands withdrawn and reserved as hereinbefore referred to would become subject to the operation of the homestead laws until after expiration of sixty days from May 17, 1915, all of which your petitioner caused to be made known to the Secretary of the Interior heretofore and in the manner prescribed for the assertion and prosecution of claims to the public lands before the Department of the Interior.

5 XI. That your petitioner did not file his application to make homestead entry of said land before the 17th day of July 1915 for the further reason, and owing to the further fact, that before taking up residence upon said land on the 5th day of June, 1915 he examined all the reported decisions of the Department of the Interior involving the construction, interpretation, application and enforcement of said act of August 18, 1894 and made inquiries among lawyers and others presumed to have notice and knowledge of the interpretation placed upon said act by the Department of the Interior and ascertained the fact to be that the said Department had uniformly and unvaryingly held and ruled that the said act excepted and removed from the operation of the homestead laws all lands withdrawn and reserved under said act until the expiration of sixty days from date of filing of the approved plat of survey and that any and all applications under the homestead laws filed prior to the expiration of said period should be rejected because until the expiration of that period the lands were in a state of withdrawal and reservation and not subject to the operation of the homestead laws, all of which your petitioner has heretofore caused to be made known to the Secretary of the Interior in the form and manner required by the practice before the Department of the Interior in the matter of presentation and prosecution of claims to the public lands before said Department.

XII. That on or about the 17th day of July 1915 the Register and Receiver of the United States Land Office at Glasgow, Montana, rejected your petitioner's homestead application for the stated reason that on July 16, 1915, (prior to expiration of sixty days from the date to wit, May 17, 1915, of the filing of the approved plat of the survey of the township and while the lands were in a state of withdrawal and reservation and before the homestead laws became applicable to them) they, the said Register and Receiver (acting in obedience to a duty imposed upon them by instructions given them in a letter from the General Land Office dated June 5, 1915) had permitted one George E. Kennedy to make a homestead entry of said land, all of which your petitioner has heretofore caused to be made known to the Secretary of the Interior in the form and manner required by the practice before the Department of the Interior.

XIII. That the said entry permitted to be made by the said Kennedy on the 16th day of July 1915, as aforesaid, rested wholly upon a homestead application for said land filed by the said Kennedy on May 25, 1915 at a time when the lands were, in pursuance of the express terms of the said act of August 18, 1894, in a state of withdrawal and reservation and excepted from the operation of the homestead laws.

XIV. That on the date of the filing of the said George E. Kennedy application, viz., on May 25, 1915, the Register and Receiver of the United States Land Office at Glasgow, Montana, acting in pursuance of the express terms of said act of August 18, 1894 excepting said lands from the operation of the homestead laws until expiration of sixty days from date of filing of the approved plat of survey of the township, and following, applying and enforcing the uniform construction of said act and practice thereunder by the Department of the Interior, rejected the said Kennedy application in the following terms, to wit:

6

"Rejected May 25, 1915 because land not open to entry until July 17, 1915, except to state of Montana and settlers prior to March 10,1910."

XV. That subsequent to the rejection of the said Kennedy application, and on June 4, 1915, the Otto M. Christenson Land Company, a firm of real estate dealers and public land locators operating in and about Glasgow, Montana, sent to, and there was received in, the General Land Office at Washington, a telegram reading as follows:

"Homestead application tendered at local office for land within state withdrawal under act August eighteenth ninety four. State had filed selections but sixty day period had not expired. Should application be suspended or rejected by local office. Wire collect."

That to said telegram from the said firm of real estate dealers and public land locators the General Land Office, on June 5, 1915, sent answer by wire as follows:

"Otto Christinson, Glasgow, Montana:

"Instruction to Register and Receiver mailed today. Application to be suspended unless in conflict with pending selection."

That on June 5, 1915, and by letter to the Register and Receiver of the United States Land Office at Glasgow, Montana, the General Land Office instructed said Register and Receiver to receive and suspend homestead applications filed within the said sixty day period and not to reject them. But notwithstanding the fact that the said letter of June 5, 1915 to the Register and Receiver at Glasgow, Montana was not received by these officers in due course of delivery of the mails before the eighth or ninth of June, 1915, there appears the following notation upon the said George E. Kennedy homestead application, to wit:

"Suspended June 4, 1915 pending preference right of State of Montana. Rejection of May 25, 1915 hereby revoked."

By whom, or when, or in pursuance of what authority such notation was made on the Kennedy application, prior to June 5, 1915 and before the said telegram was sent and the said letter was written, your petitioner is uninformed. But your petitioner avers the fact to be that at all times prior to the date of said telegram to the said firm of real estate dealers and land locators it was uniformly and consistently the rule and practice in the office of the Secretary of the Interior, in the General Land Office and in the various United States Land Offices in the several states having within their boundaries lands affected by the said act of August 18, 1894 to reject any and all filings and applications, other than selections by a state, proffered or tendered during the period of sixty days from date of filing of the approved plat of survey.

Your petitioner further alleges that until the sending of said telegram and the writing of said letter the General Land Office had, in answering inquiries addressed to it by representatives of the
7 State of Montana in the Congress of the United States and by other residents of the State of Montana concerning the status of the lands withdrawn and reserved as hereinbefore set out, made the statement, imparted the information and gave the advice that lands so withdrawn and reserved were excepted from the operation of the homestead laws until after expiration of the sixty days from date of the filing of the plat of survey.

XVI. That after rejection of your petitioner's homestead application by the Register and Receiver at Glasgow, Montana, he in due time and form appealed from the decision of rejection to the General Land Office by which office the judgment of rejection was affirmed. Your petitioner thereupon and in due time and form appealed to the Secretary of the Interior from the judgment of affirmance rendered by the General Land Office. The said Secretary in his decision rendered July 28, 1916, affirming the concurring judgments below, said, inter alia—

"May 25, 1915 George E. Kennedy filed application to make homestead for the S. ½ of said section" * * *. "On July 16, 1915, inasmuch as the State had not filed its selection for the land, the local officers allowed the application of Kennedy and placed the same of record as an entry. On the following day, at 9 a. m. Hall filed application to enter the land, which the local officers rejected, because of conflict with the entry of Kennedy.

"On July 23, 1915, Hall filed an affidavit, alleging acts of settlement on the land, beginning June 5, 1915; and that thereafter he placed a habitable house upon the land and established residence, which he has since maintained. It is indicated that Kennedy also made some attempt at settlement, but Hall alleges, and it is not disputed, that he (Hall), made prior settlement. Kennedy's claim is based on his prior application." * * * "Kennedy's application being prior in time, is also prior in right."

That on Sptember 14, 1916 the Secretary of the Interior denied a motion for rehearing. That on December 8, 1916 the Secretary of the Interior rendered a decision denying a petition for exercise of his supervisory authority saying in said decision, inter alia,—

"Kennedy's application is admittedly prior in time to Hall's settlement and he is accordingly prior in right."

XVII. That in none of the said three decisions rendered by the Secretary of the Interior is reference made to any of the many uniform and consistent decisions of his Department rendered prior to the change wrought in the construction of the said act of August 18, 1894 in and by the contents of the said telegram of June 5, 1915 to the firm of real estate dealers and land locators aforesaid, and which decisions held and ruled that no right could be acquired under a homestead application, or under any other class of application excepting an appplication to select filed by the state, tendered during sixty days from date of filing of the plat of survey of the townships. Nor does there appear in any of said decisions any comment on the manner in which a sudden and not to be expected departure was made from a uniform and consistent construction of the act of August 18, 1894 extending over a period of twenty-years, by telegraphic and advance information to a private business
8 establishment. Nor does there appear in any of said decisions a reference to the fact that by said telegram and said letter of June 5, 1915 the General Land Office gave advice and instructions and placed a construction upon the act of August 18, 1894, at variance and in direct conflict with, and in disregard of then existing authoritative decisions of the Secretary of the Interior to the effect that no rights could be acquired by the filing of homestead applications within said sixty day period. Nor does there appear in any of said decisions a reference to the fact that as late as August 14, 1915, and in the case entitled State of Idaho v. Roberson, (44 L. D., 448) it was expressly held by the Department of the Interior that no rights under the homestead laws can attach to lands which have been reserved and withdrawn under the act of August 18, 1894 until expiration of said sixty day period.

Your petitioner further represents that the only adjudication of the Department of the Interior cited in its said three decisions holding and ruling that the said George E. Kennedy acquired a right under the homestead laws within the said sixty day period by the filing of a homestead application within that period is that rendered by said Department on April 12, 1916, in Northern Pacific Railway Company v. State of Idaho; and that the adjudication in the Company v. the State, supra, was the first of the reported adjudications of said Department that recalled and vacated as authority the numerous reported decisions of said Department holding that no right could be acquired by the filing of any application, other than an application by the state to select, during the said sixty day period. And your petitioner further represents that the adjudication in the company v. the state was without retroactive or retrospective effect

and did not affect or impair the right of your petitioner to an entry of the land for which he duly applied on July 17, 1915, at a time when, under the decisions of the Department of the Interior then controlling, and authoritative and not recalled by the said telegram and letter of June 5, 1915 to the Christinson Land Company and the Register and Receiver at Glasgow, Montana, respectively, the George E. Kennedy application was ineffective and void and your petitioner's application the only lawful and valid claim.

XVIII. That the Secretary of the Interior did arbitrarily disregard the mandate and will of Congress expressed in the Act of August 18, 1894, that "after the expiration of such period of sixty days any lands which may remain unselected by the state, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands," when the said Secretary held and ruled, as he did expressly, that George E. Kennedy "appropriated according to law" when, before the expiration of "such period of sixty days," before the withdrawal and reservation had ceased and terminated and before the homestead laws were applicable to said land he filed his homestead application.

Your petitioner avers the obvious fact to be that the said act of August 18, 1894 expressly and explicitly excepted the lands from the operation and effect of the homestead laws during "such period of sixty days" for the purpose and to the end of preventing
9 the acquiring or accruing of any right or claim whatsoever as of a date within that period by the filing of a homestead application within said period; and your petitioner further avers that such was the construction placed upon said act by the Department of the Interior at all times prior to rendition of its decision in the company vs. the State, supra.

XIX. Your petitioner further represents that at the moment of expiration of sixty days from May 17, 1915 (date of filing of the township plat of survey) he was actually residing upon and improving that public land of the United States described as the South Half of Section Eighteen, Township Thirty-seven North, Range Forty-three East, Montana Meridian, Montana, with the intention of making entry thereof under the homestead laws of the United States, and that his right to make such entry thereof after the lapse of that period without selection of said land by the state of Montana was secured to him because of such residence and improvement at said moment by the provisions of the third section of the Act of May 14, 1880 (21 Stat., 140), and the uniform decisions of the Department of the Interior and of the Courts under said Act of May 14, 1880, and your petitioner avers that the Secretary of the Interior has arbitrarily denied to him the exercise and enjoyment of that right.

XX. Your petitioner further represents that the homestead application tendered by him on the 17th day of July 1915 was the first and only filing or application for said South Half Section Eighteen,

Township Thirty-seven North, Range Forty-three East, Montana Meridian, Montana, presented to any officer, or filed in any office of the land department of the United States subsequent to the release of said tract of land from the withdrawal and reservation under the said act of August 18, 1894 and subsequent to its becoming subject to the assertion of any valid claim thereto under the homestead laws, and that such application entitled your petitioner to an entry of the land which right of entry the Secretary of the Interior has arbitrarily denied.

XXI. Your petitioner further represents that the act of August 18, 1894 deprived the Secretary of the Interior of jurisdiction and power to entertain homestead applications for said land during continuance of the period of withdrawal and reservation provided for in said act and that the entertainment of the George E. Kennedy application and the ascribing to said Kennedy of a right to the land from the date of filing of his application within the period of the withdrawal and reservation was an act by the Secretary of the Interior interdicted and forbidden by the act of August 18, 1894 and of an arbitrary and capricious character.

XXII. That your petitioner's inhabitancy of the said tract of land, by actual residence thereon, at the beginning of the 17th day of July 1915, (which has been continually maintained ever since) your petitioner having then been qualified to take all the benefits of the homestead laws and having then entertained the bona fide intention of appropriating said land under said laws, gave him the right of exclusive possession of said tract of land and the further right to make entry thereof under the homestead laws in preference over all other claims for a period extending for ninety days from said date in accordance with the third section of the act of Congress of May 14, 1880, (21 Stat., 140); and that your petitioner had acquired by reason of such inhabitancy of, by actual residence upon, the said land a right of property, an interest and estate therein against everyone except the United States of which interest and estate your petitioner will have been deprived by the arbitrary act of the Secretary of the Interior if your petitioner is not afforded the protection of this Honorable Court by the granting of the prayers of this petition; and your petitioner further represents that he has extensively and valuably improved and cultivated the said land and that he will be deprived of the benefit of such cultivation and improvement, and sustain an irreparable loss of valuable property, and of property rights, in the event that the arbitrary action of the Secretary of the Interior is not set aside by the process of mandamus.

XXIII. Your petitioner further represents that the said act of August 18, 1894 is applicable to lands within the states of Washington, Idaho, Montana, North Dakota, South Dakota, Wyoming and Utah and that notwithstanding this fact and the further fact that the said letter and said telegram of the 5th of June 1915

wrought a change in the construction by the Department of the Interior of an act of Congress affecting public lands in all of said states, no notice of such change in the construction of the said act was given by telegram, letter, or otherwise to any United States Land Office in any of said states, or to any land office in the State of Montana other than the United States Land Office at Glasgow, Montana on the 5th day of June 1915 or at any time for several months thereafter. And your petitioner represents therefor- that the advice and instructions given in the said letter and the said telegram of June 5, 1915 was not a deliberate expression of a carefully formed judgment of the Department of the Interior as to the meaning and effect of the withdrawal and reservation made in pursuance of the said act of August 18, 1894 but was a hasty, ill-considered and ill-advised act or performance, unintentionally, but in reality, in conflict with and in defiance of the express and unmistakable purpose and will of Congress and of all of the decisions of the Department of the Interior theretofore rendered and involving the construction, application and enforcement of the act of August 18, 1894, and did operate to afford to the clients and patrons of the Otto Christinson Land Company, a firm of real estate dealers and public land locators in the State of Montana, an unfair advantage over numerous citizens who were advised by their counsel, and others, including officers in the public lands service that in the express terms of the said act of August 18, 1894 as well as in the language of all of the reported decisions of the Department of the Interior involving the application of the said act it was declared that no rights could be acquired by the filing of homestead applications to enter lands remaining unselected by the State of Montana until after the sixty days from date of filing of the approved plats of surveys had expired. Your petitioner further represents that he was one of those citizens so advised and that the situation described herein and presented to this court with respect to his homestead claim is substantially the same situation in which numerous other citizens in the United States in the State of Montana find themselves as a result of the sudden and unexpected ruling on the 5th day of June 1915 that applications would be received if tendered during the said sixty day period.

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Wherefore, As the respondent has refused and still refuses to accept, approve and allow your petitioner's homestead application hereinbefore described, the cause of the refusal being the respondent's arbitrary ruling that George E. Kennedy acquired a right under the homestead laws by filing an application for the land when it was withdrawn and reserved and excepted from the operation of those laws, your petitioner is deprived of a right under the laws of the United States and also of the benefit to him of performance by the Secretary of the Interior of a purely ministerial duty, and is grievously and seriously injured thereby, and as the law provides no other adequate remedy in the premises whereby your petitioner can secure the public land entry to which he is entitled and whereof he is deprived as aforesaid, your petitioner prays—

(*a*) That a writ of mandamus be issued and directed to the respondent, Franklin K. Lane, Secretary of the Interior, commanding him to accept, and to approve, your petitioner's said homestead application and to order the Register and Receiver of the United States Land Office to permit an entry of said lands under the homestead laws of the United States upon said application, and to cause due and proper evidence of the acceptance, approval and allowance of entry under the said homestead application to be delivered to your petitioner.

(*b*) For such other and further relief as the nature of your petitioner's case may require and to the Court may seem meet and proper.

VERDINE R. HALL,
Petitioner.

PATRICK H. LOUGHRAN,
Counsel for Petitioner.

STATE OF MICHIGAN,
County of Saint Clair:

I, Verdine R. Hall, being first duly sworn make oath that I am the petitioner in these proceedings; that I have read the annexed petition by me subscribed and know the contents thereof; that the statement of facts therein made as upon personal knowledge are true, and those made upon information and belief I believe to be true.

VERDINE R. HALL.

Subscribed and sworn to before me this 29th day of December 1916.

[SEAL.] DON R. CARRIGAN,
Notary Public, St. Clair County, State of Michigan.

My Commission expires Jan. 31, 1920.

12 *Rule to Show Cause.*

Filed January 29, 1917.

* * * * * * *

Upon consideration of the Petition for Mandamus in the above entitled cause, it is ordered on this 29 day of January 1917, that the respondent herein show cause on or before the 12 day of February, 1917, at 10 o'clock a. m., and in this Court, why a writ of mandamus should not issue as prayed in said petition, the date of hearing to be determined by the Court on said return date; provided, that a copy of his order and of said petition be served upon said respondent on or before the 2nd day of February, 1917.

J. HARRY COVINGTON,
Chief Justice.

Marshal's Return.

Served a copy of the within Rule and a petition on Franklin K. Lane Sec'ty of Interior, personally Jan'y 29 1917.

MAURICE SPLAIN,
Marshal.

H.

Respondent's Return to Rule.

Filed February 26, 1917.

* * * * * * *

Comes now the respondent and by way of return to the rule to show cause herein issued and for answer to the petition for mandamus says:

That the material facts are that on May 17, 1915, survey plats, including the township in which the land in controversy is situated, were filed in the local land office of the Glasgow, Montana, land district, and that therefore by operation of the Act of August 18, 1894, the State of Montana for a period of sixty days, to wit, beginning with said May 17, 1915, and terminting with July 15, 1915, secured a preference right to select any of the land embraced in the plats of survey then and there filed (with certain exceptions) such as to which it was entitled within the purview of said Act of August 18, 1894, to select, subject to the rights of settlers on portions of the land where such settlements were made prior to March 10, 1910; that on June 4, 1915, the State of Montana exercised its preference right as to lands included in the plats of survey so filed on May 17, 1915, but did not include in its selection list the land here in controversy; that as to the latter, on May 25, 1915, one George E. Kennedy filed an application to make homestead entry for said land, which application was at first rejected by the local land officers because the land was not open to homestead entry until the lapse of the sixty-day period within which the State had its preference right to select; but that later, to wit, on June 4, 1915, when the State had failed to
13 select the land in controversy, said local officers changed their said action and held said Kennedy's application suspended for the remainder of the said sixty-day period to await any further action by said State; that thereafter, on July 16, 1915, when the full sixty-day period had expired, and the State not having selected the land embraced in Kennedy's application to make entry, the said land officers allowed the application of said Kennedy and placed the same of record as an entry; that prior thereto, however, to wit, on June 5, 1915, the relator performed acts of settlement on said land and on July 17, 1915, as averred in his petition, filed an application to enter the land in controversy—which application was rejected because of conflict with the entry aforesaid of Kennedy.

He denies any averment in the petition, if any so may be construed, implying that at the time of the filing of said Kennedy's application to enter the land, there had been any holding, ruling, or construction of, or under the act of August 18, 1894, by the Secretary of the Interior that during the sixty-day period aforesaid, applications for homestead entry must be rejected; and while he admits that until June 5, 1915, such construction of the law may have been entertained by local land officers, and even by the Commissioner of the General Land Office, he states the fact to be from August 31, 1910, there had been pending before the Secretary of the Interior an appeal from the Commissioner of the General Land Office involving the construction of said Act of August 18, 1894, particularly as to the nature of the right secured under said act to a State during said sixty-day period; that the decision on said appeal is reported in 45 Land Decisions, page 37, under the title of Northern Pacific R. Co. v. State of Idaho (dated April 12, 1916) and that in said case the Secretary for the first time construed said act, holding that any reservation of lands within the meaning of the Act of August 18, 1894, for the sixty-day period therein mentioned, was for the benefit of the State, conferring on the State a preference right good as against any intervening claims, but not affecting any rights as between other parties; that selections (or other initiatory acts) during said period should not be rejected but should be received and held suspended until final adjudication of the rights of the State under any selection filed by it during said sixty-day preference period.

He further states that the notice posted April 12, 1915, in the local land office at Glasgow, Montana, referred to in paragraph 10 of the petition, after listing the townships whose plats of survey would be filed in said office at 9 o'clock a. m., May 17, 1915, was in words and figures as follows (omitting signatures of the local land officers):

The State of Montana has a preference right for 60 days from the date of filing of these plats within which to select any lands in all of the above townships except township No. 33, Ranges Nos. 43, 44, and 45 E. M. M., subject only to the right of settlers upon the said lands prior to the 19th day of March, 1910.

At the expiration of the 60 day preference right of the State of Montana any lands not selected by the said State will become subject to entry by the first qualified applicant subject only to the rights of bona fide settlers upon the land.

14 He further states the proper construction of the Act of August 18, 1894, to be that any reservation of land during the sixty-day period therein mentioned was from other appropriation as against the right of the State to select and that it was not designed to affect rights as between other individuals seeking to acquire public lands; that while for said sixty days a homestead entry could not be allowed, it could be filed and action held suspended until the expiration of said sixty days, abiding any act of selection by the State within said period of said land.

But, he says, the construction of said act, being one of the land

laws of the United States, as well as the determination of all equitable rights of parties under said act, is within his jurisdiction so long as legal title to the land yet remains in the United States; that, as appears on the face of the petition, legal title to the land in controversy, is still in the United States; that the determination of all questions such as may be presented by the petition involves on his part the exercise of judgment and discretion, not reviewable by any court on direct proceeding either by mandamus or in equity; that it further appears on the face of the petition that the controversy between said Kennedy and the relator came on in regular course and with due process of law before him to be heard and determined, and that he, through his First Assistant Secretaries has considered and determined the issues involved, on three different occasions: to wit, on appeal from the decision of the Commissioner of the General Land Office, July 28, 1916, copy of which is attached, marked "Exhibit A;" on motion for rehearing, September 14, 1916, copy of which is attached, marked "Exhibit B;" and on petition for the exercise of supervisory authority, December 8, 1916, copy of which is attached, marked "Exhibit C"—all of which exhibits are made a part of this return the same as if embodied herein.

And all allegations in the relator's petition not expressly admitted or consistent with the facts herein recited or appearing in the said exhibits, he denies; except that by this denial he does not tender any issue of fact on relator's qualification to make a homestead entry, he not having passed upon said qualifications and being without knowledge, other as in the petition appears, as to relator's qualifications as a homestead entryman; nor does he tender any issue as to the alleged telegram sent to Otto Christenson, described in paragraph 15 of the petition, which he is advised is immaterial except as showing that the General Land Office correctly construed the act of August 18, 1894, even before his decision aforesaid in the case of Northern Pacific Ry. Co. v. State of Idaho.

Wherefore, having made full and complete answer to the petition, as well as return to the rule to show cause, he prays that said rule may be discharged, that the petition may be dismissed, that he may recover his reasonable costs, and that he be permitted to go hence without day.

———,
Secretary of the Interior.

CHARLES D. MAHAFFIE,
Solicitor.

C. EDWARD WRIGHT,
Assistant Attorney.

15 DISTRICT OF COLUMBIA, *ss:*

I, Franklin K. Lane, Secretary of the Interior, on oath depose and say that I have read over the foregoing answer by me subscribed

and know the contents thereof; that the matters and things set forth I am informed are true and I believe them to be true.

FRANKLIN K. LANE,
Secretary of the Interior.

Subscribed and sworn to this 24th day of February, 1917.
Before me,
[SEAL.]
EDWD. B. FOX,
Notary Public in and for the District of Columbia.

EXHIBIT "A."

Department of the Interior.

WASHINGTON, July 28, 1916.

D-32851.

"C."

Glasgow 035062.

Rejection of Homestead Application.

Affirmed.

Verdine R. Hall.

Appeal from the General Land Office.

Verdine R. Hall has appealed from decision of March 22, 1916, by the Commissioner of the General Land Office, affirming the action of the local officers rejecting his homestead application for the S. ½, Sec. 18, T. 37 N., R. 43 E., M. M., Glasgow, Montana, land district.

It appears that on April 12, 1915, the local officers gave notice that the survey plats of said township, and other lands, would be filed in that office at 9 o'clock a. m., on the 17th day of May, 1915, and that the State of Montana had a preference right for 60 days from the date of filing of the plats, within which to select any of the lands, with certain exceptions mentioned, subject only to the right of settlers upon the lands, where settlements were made prior to March 10, 1910, the lands having been theretofore withdrawn for the benefit of the State, under the act of August 18, 1894 (28 Stat. 394).

May 25, 1915, George E. Kennedy filed application to make homestead entry for the S. ½ of said section 18, which the local officers at first rejected because the land was not open to entry until the
16 expiration of the 60-day preference right accorded the State Later, however, on June 4, 1915, as stated by the Commissioner, the local officers changed their action respecting the Kennedy application, and held the same suspended to await action by the State. On

July 16, 1915, inasmuch as the State had not filed its selection for the land, the local officers allowed the application of Kennedy and placed the same of record as an entry. On the following day, at 9 a. m., Hall filed application to enter the land, which the local officers rejected, because of conflict with the entry of Kennedy.

On July 23, 1915, Hall filed an affidavit, alleging acts of settlement on the land, beginning June 5, 1915; and that thereafter he placed a habitable house upon the land and established residence, which he has since maintained. It is indicated that Kennedy also made some attempt at settlement, but Hall alleges, and it is not disputed that he (Hall), made prior settlement. Kennedy's claim is based on his prior application.

Hall urges that there was no authority for receiving and suspending the application of Kennedy during the 60-day period, and yet, he is claiming for himself a preference right by virtue of his settlement during the said period. His contention is illogical, however, for if the State's preference right under the act of 1894, was an obstacle to the reception of the suspended filing, it was equally effective to prevent a settlement. The Commissioner of the General Land Office, on June 5, 1915, instructed the local officers that applications to enter should be received and suspended during the 60-day period, if the State had not, prior to such application, filed its selection. Also, this subject was considered in departmental decision of April 12, 1916, in the case of the Northern Pacific Railway Company v. State of Idaho (45 L. D. —), wherein it was held that the act of 1894 merely accorded a preferred right to the State during the 60-day period, and that other claims to the land might be filed and suspended, subject to the preferred right of the State.

In the present case, the State failed to avail itself of the preferred right, so that the conflict is between Kennedy, under his application, and Hall, under his settlement claim. The ordinary rule in such cases must govern. Kennedy's application being prior in time, is also prior in right.

The action below is correct, and is hereby affirmed.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary.

17

EXHIBIT "B."

Department of the Interior.

WASHINGTON, September 14, 1916.

D-32851.

"C."

Glasgow 035062.

Homestead Application Rejected.

Rehearing Denied.

Ex Parte Verdine R. Hall

Motion for Rehearing.

Verdine R. Hall has moved a rehearing respecting the decision of July 28, 1916, which affirmed the rejection of his homestead application for the S. ½, Sec. 18, T. 32 N., R. 43 E., M. M., Glasgow, Montana, land district, for conflict with a prior application of one George E. Kennedy.

The land in question was part of a tract which was surveyed at the request of the State, and was held for sixty days from date of filing the plat subject to selection by the State. Within that period Kennedy filed his application. This was rejected because of the State's preference right, but afterwards the rejection was by order from the General Land Office changed to a suspension, and on the expiration of the State's preference period, Kennedy's application was allowed. On the next day Hall filed his application, claiming settlement on the land, which he alleges he made on or before the date of the order referred to.

In support of the motion, claimant questions the validity of said order, contending that it is contrary to precedent, and that it deprives him of acquired rights. There is no merit in these contentions. The order followed an administrative rule for disposing of applications in such circumstances. Furthermore, Hall had acquired no rights whatever by settling on land at a time when it was not open either for entry or settlement. These questions were sufficiently considered in connection with the decision.

The motion is denied.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

18

EXHIBIT "C."

Department of the Interior.

WASHINGTON, December 8, 1916.

D-32851.

"C."

Glasgow 035062.

Homestead Application Rejected.

Petition Denied.

Ex Parte Verdine R. Hall

Petition for the Exercise of Supervisory Authority.

Verdine R. Hall has filed a petition for the exercise of the Department' supervisory authority in the matter of his homestead application 035862, for the S. ½, Sec. 18, T. 37 N., R. 43 E., M. M., Glasgow, Montana, land district, which was ordered rejected by the Department's decisions of July 28 1916, and September 14, 1916. The matter has been orally argued.

The above township was reserved by the Commissioner of the General Land Office March 23, 1910, under the act of August 18, 1894 (28 Stat., 394), subject to the right of the State from March 10, 1910, until 60 days after the filing of the plat of survey. The plat was approved November 12, 1914, and filed in the local land office May 17, 1915.

May 25, 1915, George E. Kennedy filed homestead application 035720 for the above tract, which was rejected the same day by the register and receiver because of the outstanding right of the State. June 4, 1915, the register and receiver revoked their order of rejection and suspended Kennedy's application. The State having failed to select the land, entry upon Kennedy's application was allowed July 16, 1915. July 17, 1915, Hall filed his application, alleging that he had settled upon the land June 5, 1915.

Counsel contends that during the 60 day period provided for in the act of August 18, 1894, supra, the land was absolutely withdrawn from appropriation, that Kennedy therefore gained no rights by the presentation of his application and, while conceding that the land was not subject to settlement at the time Hall initiated his settlement, he further contends that Hall's settlement rights attached as soon as the 60 day period allowed to the State had expired. The argument of the counsel is based upon the phraseology of the act of August 18, 1894, supra, which directs that the Commissioner of the General Land Office upon application of the governor of the State,—

19 * * * with a view to satisfy the public-land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of the land called for thereby * * *

to have a survey made. The land so surveyed—

* * * shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants. * * *

The act further requires that the State publish a notice—

* * * to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands. * * *

The argument of counsel is that this act *reserves* the land from any appropriation, that the right of selection by the State is exclusive of all other appropriations and that the land does not become subject to disposition under the general laws until after the 60 day period of selection allowed to the State. In other words the argument is that the act constitutes an absolute withdrawal of the land and does not create merely a preference right to the State.

The preceding act of March 3, 1893 (27 Stat., 592), provides that the States therein enumerated—

* * * shall have a preference right over any person or corporation to select lands subject to entry by said States granted to said States by the act of Congress approved February twenty-second, eighteen hundred and eighty-nine, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States: And provided further, That such preference right shall not accrue against bona fide homestead or pre-emption settlers on any of said lands at the date of filing of the plat of survey of any township in any local land office, of said States.

The two acts were construed by the Department in Northern Pacific Railway Company v. The State of Idaho, Coeur d'Alene 02483, April 12, 1916 (45 L. D., —). The Department there said:

Taking the two acts together it is clear that their purpose was to secure to the State the period of sixty days within which the State should have a right to select the land superior to all others. The

act of March 3, 1893, speaks of this as a preference right. The act of August 18, 1894, directs that the land shall be reserved "from any adverse appropriation."

In the present case the selection filed by the railway company was first in time and it was then unknown whether the State would exercise its right or not. The rights of the State are fully protected by suspending the railway company's selection until the State selections have been fully adjudicated. Should the State have failed to make a proper selection there is no reason apparent why the railway company's selection, if otherwise valid, may not be allowed.

The purpose of the act of August 18, 1894, was to secure the survey of unsurveyed townships and to enable the States therein named to secure their full quota of the various grants made to them. The act reserves the land from other appropriation as against the right of the State to select and the State has the exclusive right of selection as against all other persons. The act was designed to affect the rights as between other individuals seeking to acquire public lands, and counsel here is endeavoring to invoke a statute passed in the interest of various States for the benefit of an individual who is not within the purview of that law. As stated in Northern Pacific Railway Company v. Idaho, supra, the rights of the State are fully protected by permitting it the first right of selection during the 60 day period. Should any other individual apply for the land in the meantime his application can properly be accepted and suspended awaiting action by the State. Should the State fail to select the land there is no reason why the immediate application cannot be allowed.

Kennedy's application is admittedly prior in time to Hall's settlement and he is accordingly prior in right.

The petition is accordingly denied.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

Demurrer.

Filed March 6, 1917.

* * * * * * *

Comes now the relator, by his counsel, and says that the respondent's answer to the rule and petition herein is bad in substance.

The matters of law intended to be argued are these:

1. That the land which is the subject of this litigation was, by reason of the express provisions of an act of Congress (approved August 18, 1894, 28 Stat. 272, 394) and proceedings thereunder duly taken by the State of Montana, completely removed from and placed beyond the jurisdiction and power of any and all of the officers of the land department of the United States to administer under

the homestead laws with respect thereto from the 10th day of March 1910 until the close and ending of the 16th day of July 1915.

II. That by the act of August 18, 1894 the officers of the land department of the United States were admonished and enjoined by Congress that they should see to it that the homestead laws of the United States should not be successfully invoked by any claimant under those laws whose act of settlement upon the land, or whose application under those laws, was initialed at any time between the 10th day of March 1910 and before the 17th day of July 1915.

21 III. That it was the will of Congress that any and all lands duly withdrawn and reserved under that statute should not become subject to any claim whatever under the homestead laws of the United States at any time within and during said period.

IV. That the action of the Secretary of the Interior in attempting to impart validity to a homestead application filed by one George E. Kennedy within said period was action by an officer of an executive department of the government at variance with and contrary to the plain and unmistakable mandate of Congress with respect to public lands of the United States and was an unlawful and arbitrary, although unintentionally so, abuse and misuse of official power.

V. That the doctrine of relation is without application to any settlement or filing under the homestead laws which was made at a time when the lands affected by such settlement or filing were withdrawn and reserved and excepted from the operation of such laws by and under said statute of August 18, 1894.

VI. That the George E. Kennedy application was duly and rightfully rejected by the Register and Receiver when it was tendered and that the subsequent act of those officers in revoking the order of rejection and substituting therefor an order of suspension was an attempt by them to exercise jurisdiction over the lands under the homestead laws at a time when they had neither such jurisdiction nor power to do aught more with respect to the Kennedy application than to reject it.

VII. That the State of Montana did not acquire only a preference right of selection of the lands during the period of sixty days following the filing of the plats of survey but that it was given, and had, by the express terms of the act of August 18, 1894, an exclusive right of selection during such period and that such exclusive right precluded, prevented, and forbade the making or filing of any applications for such lands under any other laws during that period.

VIII. That the selection made by the State of Montana on June 4, 1915 did not estop the state from making further and additional selections thereafter and at any time before lapse or expiration of the period of the exclusive right of selection accorded the state by the said act of August 18, 1894.

IX. That, contrary to the allegation of respondent in his answer, the Department of the Interior did at many times prior to April 12, 1916, date of rendition of its decision in Northern Pacific Railway Company vs. State of Idaho, construe the said act of August 18, 1894 and did construe it to mean the contrary of the meaning placed upon it by the Department of the Interior in its said decision of April 12, 1916, which decision of said date is at variance with and overrules the decision of the Department of the Interior of March 20, 1911 in Northern Pacific Railway Company vs. State of Idaho, (39 L. D., 583, 590), and numerous other earlier decisions which will be cited and discussed in relator's argument.

X. That upon expiration of the sixty day period subsequent to filing of the plats of survey, the only valid claim then existing with respect to the land was the claim asserted by the relator under and by reason of his actual settlement upon the land at the moment of the expiration of said period and by his filing on the 17th day
22 of July 1915 of his application to appropriate the land under the homestead laws.

VERDINE R. HALL,
By PATRICK H. LOUGHRAN.

Amendment of Petition by Stipulation.

Filed March 6, 1917.

* * * * * * *

The parties to the cause entitled as above, by their respective counsel, hereby stipulate and agree that the petition filed therein be held and regarded as amended hereby in the following respect, to wit:

That for any and all of the purposes of this proceeding the prayer of the original petition designated as "(*a*)" at page fourteen thereof be held and regarded as entirely stricken therefrom and that there be, and is hereby, substituted therefor, the following prayer, to wit,

(*a*) That a writ of mandamus be issued and directed to the respondent, Franklin K. Lane, Secretary of the Interior, commanding him to administer, execute and enforce the provisions of the act of August 1894 (28 Stats. 394) by the performance of that ministerial duty imposed upon him thereby, namely, to see to it, as explicitly provided in said statute, that lands affected by that legislation "shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office," and that, as also explicitly provided in said statute, to see to it that no such lands "shall be subject to disposal under general laws as other public lands" until after expiration of such period of sixty days, and to that end, to recall, vacate, set

aside and hold for naught, in so far as consideration and adjudication in the Department of the Interior of your petitioner's claim under his said homestead settlement and application is concerned or affected thereby, that arbitrary holding and ruling under, in conformity to, and as a result of which your petitioner's said claim was rejected by said Department, namely, that right may be acquired under the homestead laws to public lands of the United States during the period of a valid and complete withdrawal and reservation thereof under and in pursuance of said act and before the homestead laws are applicable to such lands, and to proceed thereafter with such further consideration of your petitioner's said claim as may be needful to due determination of its merits in the exercise of the lawful judgment and discretion of the said Secretary.

VERDINE R. HALL,
By PATRICK H. LOUGHRAN,
Counsel.

We interpose no objection hereto—
CHARLES D. MAHAFFIE.
C. EDWARD WRIGHT.

23 *Memorandum Opinion.*

Filed May 13, 1918.

* * * * * * *

The petition in this case is filed by Hall, asking that a writ of mandamus be issued directing the Secretary of the Interior to accept and approve the petitioner's homestead application for a certain half section of public land in the State of Montana, and to order the Register of the Land Office to permit an entry of the lands upon such application, and to cause proper evidence of the allowance of entry to be delivered to the petitioner.

The Act of August 18, 1894 (28 Stat. 394) authorized the governors of several western states, among them Montana, to apply to the Commissioner General of the Land Office for the survey of any township or townships of public land with a view to satisfying the public land grants made by the several acts admitting those states into the Union, and the act provides that such lands

"shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim."

In conformity with the provisions of that statute, a plat of the survey of Township 37 north, range 43, Montana Meridian, Montana, was filed on the morning of May 17, 1915 in the office of the Register and Receiver at the land office, Glasgow, Montana.

On May 25, 1915, one Kennedy filed an application to make a homestead entry on a certain half section of the land of such township. This application was at first rejected by the local land officials at Glasgow, but on June 4, 1915 that rejection was revoked and instead it was merely suspended pending the "preference right" of the State of Montana under the provisions of the Act of August 18, 1894 to select the half section applied for by Kennedy.

On June 5, 1915, Hall, the relator, actually entered upon, took up his residence on and began cultivating the same half section of land for which Kennedy had, on May 25, 1915, filed the application which had been dealt with as above described, and the State of Montana not having selected that half section of land under the provision of the Act of August 18, 1894, he, Hall, on the morning of July 17, 1915, filed in the office of the Register and Receiver of the land office at Glasgow an application to make entry on that same half section under the homestead laws of the United States, and thereafter, in compliance with those laws, he filed his affidavit, corroborated by witnesses, establishing his actual residence upon the land on June 5, 1915 and thereafter.

24 On the morning of July 16, 1915, however, the Register and Receiver of the land office at Glasgow, with the application of Kennedy of May 25, 1915 held in that office as suspended and not revoked, allowed the application and placed the same of record as an entry, and when on the morning of July 17, 1915 Hall filed his application to enter on the same half section in conformity with the homestead laws upon the basis of actual settlement, the application was rejected because it was held to be in conflict with the allowed entry of Kennedy.

The importance of the legal questions involved, and the great practical importance of the decision of the Secretary of the Interior, affecting as it obviously does many valuable land entries in the State of Montana merit an exhaustive discussion of the law as applicable to the present case, but in the great pressure of work in the court it is impossible in this opinion to give more than the conclusions arrived at.

There are two broad questions presented by the petition for the writ of mandamus, and the return thereto filed by the Secretary of the Interior.

First. Is this case one in which the court may appropriately grant a writ of mandamus directing the Secretary of the Interior to perform an act which he is refusing to perform, or to compel him to act in consonance with the law because he is, in apparent defiance of the law, acting capriciously or arbitrarily or beyond the scope of the administrative authority confided to him?

A careful examination of the act of August 18, 1894, in the light of the existing land laws, and the authority of the General Land

Office and the Secretary of the Interior in relation thereto, convinces the court that the decision of the Secretary of the Interior, sustaining the action of the Commissioner of the General Land Office in affirming the decision of the Register and Receiver of the local land office at Glasgow, was an act of judgment and discretion within the scope of his authority as Secretary of the Interior construing and administering the land laws, and in consequence his decision in this case cannot be reviewed by this court. To do that would be to convert the writ of mandamus into a writ of error. It requires the citation of no authorities to establish the unsoundness of such a proposition of law.

Second. Over and beyond the question of the authority of the court to grant the writ of mandamus petitioned for in the present case, however, is the question which is involved in the legal propriety of the actual decision of the Secretary of the Interior, affirming the action of the subordinate tribunals of his Department in administering the land laws applicable to the case of the relator.

Assuming the right of the court to determine the propriety of the decision of the Secretary in the present case, it would seem that the decision was sound. The reasonable rule of construction of the provision in the Act of 1894, to be found in the language which provides that the State shall have the "preference right" to select any of such lands within the township survey

25 "until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office,"

does not exclude both the date of filing and the last day of the sixty days. That is to say, if the township plat of survey was filed in the land office at Glasgow on the morning of May 17, 1915, the sixty days within which the State had its "preference right" of selection of land in the township expired with the close of the day of July 15, 1915, and the land not selected was on the morning of July 16, 1915, certainly open to entry under the public land laws. If, therefore, the Kennedy application had been one filed by him on the morning of July 16, 1915, it would seem that there can be no doubt of its priority over an application filed by the relator, Hall, on the morning of July 17, 1915, Hall having acquired no right as against Kennedy by his occupancy of the half section prior to July 16, 1915.

The only remaining question, therefore, is whether or not the course of conduct in respect of the application of Kennedy at the local land office in Glasgow subsequent to the day of its original filing on May 25, 1915 was such as to preclude it from being considered an application on file on the morning of July 16, 1915. Up to the morning of July 16, 1915, the application of Kennedy, of course, had no effect as against the State of Montana. It is alleged to have been the uniform practice of the General Land Office, prior to the ruling of June 4, 1915 in respect of the Kennedy application, to treat such applications as rejected, but that is purely an adminis-

trative question, and if the General Land Office determined at that time to hold that applications thus received could be retained in the local land office where filed and simply be treated as suspended until it became known whether the State was actually to exercise its "preference right" of selection of the section involved in the application, there does not seem to be anything in the decided cases, or in principles of statutory construction, to preclude that changed view by the General Land Office.

Considering, therefore, the legal merits of the facts presented by the relator's petition, and independently of the question of the propriety of a review of the action of the Secretary of the Interior in the pending case, it would seem that the decision rendered by him was one entirely permissible under the law.

Demurrer to return and answer overruled.

Rule discharged and petition dismissed.

J. HARRY COVINGTON,
Chief Justice.

May 2, 1918.

Supreme Court of the District of Columbia.

MONDAY, May 13, 1918.

Session resumed pursuant to adjournment, Mr. Justice Gould presiding.

* * * * * * *

26 By Covington, C. J.

This cause having heretofore been argued and submitted to the Court upon the petition, rule to show cause, answer of respondent, and demurrer to respondent's answer to rule and petition, it is considered that said demurrer be, and the same is hereby overruled; whereupon the petitioner now in open Court says that he will stand upon his demurrer.

Wherefore, it is considered that the rule to show cause issued herein be, and the same is hereby discharged, the petition is hereby dismissed, and that the respondent recover of the petitioner the costs of his defense, to be taxed by the Clerk, and have execution thereof.

From the foregoing the petitioner by his Attorney in open Court, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100.00), or, in lieu thereof, a deposit of Fifty dollars ($50).

Memorandum.

May 27, 1918.—$50 deposited in lieu of appeal bond.

Assignments of Error.

Filed May 27, 1918.

* * * * * * *

The appellant, Verdine R. Hall, hereby specifies error in the judgment of the court, entered in the above entitled cause, dismissing the petition for mandamus filed therein by relator:

1. In failing to find and hold that the act of Congress of August 18, 1894 (28 Stat. 394) expressly provides for the withdrawal and reservation of public lands of the United States from filing, appropriation and disposal under the homestead laws "for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the town-ship plat of survey in the proper District Land Office."

2. In failing to find and hold that the said act of August 18, 1894, gave to the states named therein, and to persons whose claims existed prior to the withdrawal and reservation provided for in said legislation, the exclusive right to select and file during the period of sixty days following the date of filing of the town-ship plat of survey.

3. In failing to find and hold that the said act of August 18, 1894, expressly provides that none of the provisions of the homestead laws shall be applicable to any lands withdrawn and reserved under said act during the period of such withdrawal and reservation.

4. In failing to find and hold that public lands withdrawn and reserved under the said act of August 18, 1894, are removed beyond the jurisdiction and power of any officer of the Land Department to administer with respect thereto any of the provisions of the homestead laws during the period of continuance of the withdrawal and reservation.

27

5. In failing to find and hold that the said act of August 18, 1894, expressly forbade and prohibited the filing of applications under the homestead laws for any lands withdrawn and reserved under said act during the continuance of such withdrawal and reservation and enjoined upon the Secretary of the Interior and other officers of the Land Department the ministerial duty of rejecting any homestead application tendered or filed during the continuance of such withdrawal and reservation.

6. In failing to find and hold that the homestead application filed by George E. Kennedy during the continuance of the withdrawal and reservation provided for in said act of August 18, 1894, was void

ab initio and that the act of the Secretary of the Interior in sustaining said Kennedy application as a lawful filing as of the date of its tender was arbitrary.

7. In failing to find and hold that the period of sixty days from the date of the filing of the township plat of survey of the lands here in suit did not terminate or expire until the beginning of the 17th day of July, 1915.

8. In failing to find and hold that as relator's homestead application was the first application for the land in suit tendered upon the expiration of said period of sixty days it was arbitrary for the Land Department to have rejected same because of its conflict with the Kennedy application which was tendered during the period of the withdrawal and reservation provided for in the said act of August 18, 1894.

9. In failing to find and hold that the decision of the Land Department imparting validity to the Kennedy application and ascribing a seniority to the same over the application of this relator was an arbitrary attempt on the part of the Land Department both to administer the homestead laws to public lands at a time when they were, in the express terms of the act of August 18, 1894, withdrawn and reserved from the operation and effect of said laws, and an arbitrary attempt to defeat the relator in his rights as the first applicant under the homestead laws after said laws became operative and effective and to deprive him of his vested right to a preference of entry because of his occupancy of the land in suit at the moment of termination of the withdrawal and reservation provided for in said act of August 18, 1894.

10. In failing to find and hold that the decision of the Land Department complained against in the petition for mandamus was a new and sudden departure from rules of decision of the Land Department which had obtained, and were observed uniformly, at all times subsequent to approval of the said act of August 18, 1894, until about the time of rendition by the Land Department of its decision sustaining the George E. Kennedy application as a lawful and valid filing despite its tender during the period of withdrawal and reservation provided for in the statute of August 18, 1894.

11. In failing to grant to relator the relief prayed against
28 the acts of the respondent in attempted divesture of relator's right of entry of the land in suit under the homestead laws.

12. In failing to grant the mandamus petitioned for by the relator and in dismissing his petition.

13. Other errors appearing on the face of the record herein.

PATRICK H. LOUGHRAN,
Attorney for Relator.

Service of copy of the above assignment of error acknowledged this 27th day of May, 1918.

CHARLES D. MAHAFFIE,
Attorney for Respondent.

Designation of Record.

Filed May 27, 1918.

* * * * * * *

To John R. Young, Esq., Clerk Supreme Court of the District of Columbia.

MY DEAR SIR: On behalf of the above named Verdine R. Hall, Relator and Appellant, I request that you will cause to be prepared the transcript of record on appeal in the above entitled cause; and I hereby designate the following to be included in said transcript:

1. The relator's petition.

2. The Court's rule to show cause.

3. The return of the respondent to the rule to show cause and his answer to the petition, and all the exhibits accompanying the same.

4. Relator's demurrer to respondent's answer.

5. Amendment of relator's petition by stipulation.

6. Opinion of the Court.

7. Order of the Court discharging rule and dismissing petition, including endorsement thereon of appeal in open court and order fixing amount of appeal bond for costs, or deposit of cash in lieu of such bond.

8. Assignment of errors.

9. Memorandum of acceptance of cash deposit in lieu of filing of bond for costs.

10. This designation.

PATRICK H. LOUGHRAN,
Attorney for the Relator and Appellant.

Receipt of copy of this designation acknowledged this 27th day of May, 1918.

CHARLES D. MAHAFFIE,
Attorney for the Respondent.

29 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 45, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59941 at Law, wherein The United States of America on the relation of Verdine R. Hall is Plaintiff and Franklin K. Lane, Secretary of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 24th day of June, 1918.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG,
Clerk.
By ALF. G. BUHRMAN,
Ass't Clk.

Endorsed on cover: District of Columbia Supreme Court. No. 3196. The United States of America on the relation of Verdine R. Hall, appellant, vs. Franklin K. Lane, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Jun- 26, 1918. Henry W. Hodges, clerk.

30 MONDAY, December 2nd, A. D. 1918.

No. 3196.

THE UNITED STATES OF AMERICA on the Relation of VERDINE R. HALL, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

The argument in the above entitled cause was commenced by Mr. P. H. Loughran, attorney for the appellant, and was continued by Mr C. E. Wright, attorney for the appellee, and was concluded by Mr. P. H. Loughran, attorney for the appellant. On motion, the appellant is allowed five days to file a supplemental brief herein if so advised.

31 Court of Appeals of the District of Columbia.

No. 3196.

THE UNITED STATES OF AMERICA ex Rel. VERGINE R. HALL, Appellant,

v.

FRANKLIN K. LANE, Secretary of the Interior.

Opinion.

Mr. Chief Justice SMYTH delivered the opinion of the Court:

Hall filed a petition in the Supreme Court of the District of Columbia in which he asked for a mandamus against the Secretary of the Interior directing him to approve the petitioner's homestead application for certain lands in Montana; to order the register and receiver of the proper land office to permit an entry by him of the lands under the homestead laws; and to cause proper evidence of the allowance of his entry to be delivered to him. A rule to show cause was issued to which the Secretary made a return. The petitioner demurred to the return; the demurrer was overruled, and, he electing to stand on his demurrer, the petition was dismissed.

The Governor of Montana, pursuant to an act of Congress approved in 1894 (28 Stat., 394) made application for the survey of an unsurveyed township in that State for the purpose of satisfying the public land grants made to the State. In the act it was provided that the lands affected "shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim."

The act also provides for a notice "to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands.

On May 17, 1915, a survey plat of the township in which the land in controversy is situated was filed in the proper district land office. Thereafter on June 4, 1915, the State exercised the right of selection given to it by the act of Congress but did not take the lands here involved. On May 25, same year, one Kennedy filed an application to make homestead entry for the land in dispute. His application

was at first rejected by the land office for the stated reason that the land was not open to entry until the lapse of the sixty-day period within which the State had "the exclusive right" to select the land. But later, to wit, on June 4, the office reversed its decision and held that, while Kennedy's application could not become effective until the sixty-day period had elapsed, it would be treated as suspended only during that period. Upon the completion of the period, the State not having selected the land upon which Kennedy had filed, the land office allowed his application. June 5, 1915, or the day after the land office reversed the decision, as just stated, Hall performed certain acts of settlement on the land and on July 17 filed an application to enter it. This application was denied on the footing that it was subsequent to the Kennedy application, which was treated as effective from the moment the sixty-day period had expired. From this decision Hall appealed to the Commissioner of the General and Office, and being unsuccessful there took his case before the Secretary of the Interior who affirmed the Commissioner.

He contends that it was illegal for the Secretary to give any force to Kennedy's application, since it was filed within the sixty-day period during which "the lands were reserved from any adverse appropriation;" that since Kennedy did not make application after the expiration of that period he has no valid application on file and hence that he, Hall, should be regarded as the only applicant.

The Secretary of the Interior in reaching the conclusion complained of was required to interpret the act of 1894 and apply it to the facts disclosed by the record before him. In doing this he exercised the powers conferred upon him by Congress to administer the public lands. Within the domain of those powers he is free from the control of the courts. "Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands. Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion." Riverside Oil Co. v. Hitchcock, 190 U. S., 316, 324. This has often been decided by the Supreme Court of the United States and by this court. Decatur v. Paulding, 14 Pet., 497; Marquez v. Frisbie, 101 U. S., 473; Gaines v. Thompson, 7 Wall., 347; O'Brien v. Lane, 40 App. D. C., 493, 495, United States Ex Rel. Red River Lumber Co. v. Fisher, 39 App. D. C., 181, Handel v. Lane, 45 App. D. C., 389; United States Ex Rel. Ashley v. Roper, 48 App. D. C., 69, 75.

To be sure, where the Secretary acts ministerially or arbitrarily—where it is clear this decision has no basis in the law, that he acts outside of the law, the rule is otherwise. Roberts v. United States, 176 U. S., 221, 230; American School of Magnetic Healing v. McAnnulty, 187 U. S., 94; O'Brien v. Lane, supra. But that is not this case. It can not be correctly said that when the Secretary held that the act of Congress, forbidding adverse appropriation of the land

during the sixty-day period, did not prohibit the filing of an application for entry while that period lasted, he completely missed the significance of the act. Indeed, it might well be said that his decision rested on a sound foundation; that filing an application did not constitute an "adverse appropriation" of the lands, a taking of them "to oneself in exclusion of all others" (Webster's Dictionary). But upon this we express no opinion, because it would not be proper to do so.

There is nothing in the record which differentiates this case from any other in which a party has been unsuccessful before the Interior Department. If Hall has a right to a writ of mandamus in this case, then every defeated litigant before the Department would have a like right. And if we admit that he would, it must be on the assumption that this court has the power to review the decisions of the Secretary of the Interior upon an application for such a writ. But it does not possess that power, for it is familiar law that "The writ [of mandamus] never can be used as a substitute for a writ of error." Riverside Oil Co. v. Hitchcock, supra.

32 There is another reason why the appellant has no standing in court. If Hall's claim is sound he can, as soon as a patent has been issued to Kennedy, bring a suit in equity to have the title impressed with a trust in his favor. In such a suit Kennedy would be a party and could defend his rights, if he has any, something which he may not do in the present case. The only question involved would be one of law. Hall would be at no disadvantage in presenting his claim by reason of the fact that Kennedy held the patent. Every right which he here asserts could be fully guarded in that suit. In Litchfield v. Register and Receiver, 9 Wall., 575, 578 the court denied an application for an injunction to restrain the officers of the land department from taking action with respect to a dispute as to whether or not a certain piece of land was subject to entry, saying: "After the land officers shall have disposed of the question, if any legal right of plaintiff has been involved, he may seek redress in the courts. He insists that he now has the legal title. If the land department finally decides in his favor, he is not injured. If they give patents to the applicants for preemption, the courts can then in an appropriate proceeding determine who has the better title or right."

In the recent case of Minnesota v. Lane, 247 U. S., 243, 250, where a like question was involved, the court said, "the remedy must be sought in the courts after the issuance of patent. Under such circumstances as are here disclosed this court has uniformly so held." Hall has therefore an adequate remedy without resorting to an application for a writ of mandamus, and where this is so the writ will be denied. *LeCroue* v. McAdoo, decided at this term; Moore v. United States, 33 App. D. C., 507, 602; In Re Key, 189 U. S., 84, 85; In Re Pennsylvania Co., 137 U. S., 451, 453.

With reluctance we approach the disposition of another matter. Counsel for appellant by leave of court, filed a supplemental brief after the argument at the bar. Therein he charged the land department with deciding cases "under the pressure of argumentative or

other influences brought to bear by the Northern Pacific Railway Company." The appellee moved to strike the brief on the ground that "the statement is by innuendo libelous and scandalous." In opposition counsel for the appellant filed another paper which he denominated an answer and which is only just a little less offensive than the first. The clear intimation of the statement quoted is that the land department of the Government has been controlled in certain cases by sinister influences. Of course there is no basis for this in the record—it is wholly gratuitous. Just why a member of this bar should make a charge so groundless is difficult to understand. It advantages neither him nor his client. The motion to strike is sustained and the so-called answer is also stricken from the records.

The judgment of the court below being in all respects correct, is affirmed with costs. Affirmed.

Mr. Justice Robb concurs on the ground that appellant has an adequate remedy without resorting to the writ of mandamus; that is, he concurs in the opinion except as to the first point.

33 MONDAY, January 6th, A. D. 1919.

January Term, 1919.

No. 3196.

THE UNITED STATES OF AMERICA on the Relation of VERDINE R. HALL, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and on a motion to strike out the appellant's supplemental brief, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs; and it is further ordered that the motion to strike out the appellant's supplemental brief be, and the same is hereby sustained; and that the supplemental brief, together with the answer to the motion to strike out, be, and the same are hereby stricken from the record of the case.

Per MR. CHIEF JUSTICE SMYTH.

January 6, 1919.

Mr. Justice Robb concurring except as to the first point.

34 In the Court of Appeals of the District of Columbia.

October Term, 1918.

#3196.

THE UNITED STATES OF AMERICA on the Relation of VERDINE R. HALL, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Motion for Allowance of Writ of Error to the Supreme Court of the United States.

Comes now the appellant and prays the Court for allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States and for reasons for allowance of such writ respectfully shows that he is entitled thereto under the fifth paragraph of section two hundred and fifty of the Judicial Code, providing for the allowance of such writ "in cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question," and your petitioner will ever pray.

PATRICK H. LOUGHRAN,
Counsel for Appellant.

35 In the Court of Appeals of the District of Columbia.

October Term, 1918.

#3196.

THE UNITED STATES OF AMERICA on the Relation of VERDINE R. HALL, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Assignment of Error on Application for Writ of Error to the Supreme Court of the United States.

The Court erred

I. In failing to hold and rule that by virtue of the express provisions of the Act of August 18, 1894 (28 Stat. 394) the Secretary of the Interior, and all other officers of the Land Department of the United States, were deprived of authority and jurisdiction to administer the homestead laws of the United States to lands withdrawn and reserved under said act at any time before expiration of the period

of sixty days following the filing of the plat of the survey of such lands in the appropriate local land office, as provided in said act.

II. In failing to hold and rule that as the said act of 1894 deprived the Land Department, and all officers thereof, of any authority to administer the homestead laws to lands withdrawn and reserved under said act until after the expiration of the said period of sixty days, it was beyond the scope of any power or duty of any officer of the Land Department to permit anyone to initiate a claim under the homestead laws by the filing of an application for entry under those laws during the sixty days following the filing of the plat of survey, as provided in said act.

36 III. In failing to hold and rule that the authority which the Land Department assumed to exercise by permitting the initiation of claims under the homestead laws during the sixty day period was without validity because opposed to and in direct conflict with a mandate of Congress written in the said act of 1894 to the effect that the general laws, which include the homestead laws, should not be applicable until after the expiration of such sixty day period.

Respectfully submitted,

PATRICK H. LOUGHRAN,
Counsel for Appellant.

(Endorsed:) #3196. U. S. of A. ex rel Hall v. Lane, Secy. Motion for Allowance of Writ of Error to Sup. Ct. U. S. Court of Appeals, District of Columbia, Filed Mar. 3, 1919. Henry W. Hodges, Clerk.

37 FRIDAY, March 7th, A. D. 1919.

No. 3196.

THE UNITED STATES OF AMERICA on the Relation of VERDINE R. HALL, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, It is ordered by the Court that said writ issue as prayed, and the bond for costs is fixed at the sum of three hundred dollars.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before

you, or some of you, between The United States of America on the relation of Verdine R. Hall, Appellant, and Franklin K. Lane, Secretary of the Interior, Appellee, a manifest error hath happened, to the great damage of the said Appellant, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of March, in the year of our Lord one thousand nine hundred and nineteen.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

39 (*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Verdine R. Hall, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Franklin K. Lane, Secretary of the Interior in the full and just sum of Three Hundred (300) — to be paid to the said Franklin K. Lane, Secretary of the Interior, certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 17th day of March, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between United States Ex Rel. Verdine R. Hall, v. Franklin K. Lane, Secretary of the Interior, a judgment was rendered against the said Verdine R. Hall and the said Verdine R. Hall having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Franklin K. Lane, Secretary of the Interior citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Verdine R. Hall shall prosecute said writ of error to effect, and an-

swer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

VERDINE R. HALL. [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, [SEAL.]
By GEORGE H. PRICE, [SEAL.]
Attorney in Fact.

[Corporate Seal.]

Sealed and delivered in the presence of—
KING LEWIS.

Approved by—
C. J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

[Endorsed:] 3196. The United States of America on relation of Verdine R. Hall, Appellant, vs. Franklin K. Lane, Secretary of the Interior. Bond on writ of error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Mar. 31, 1919. Henry W. Hodges, Clerk.

40 UNITED STATES OF AMERICA, *ss:*

To Franklin K. Lane, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America on the Relation of Verdine R. Hall is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 31st day of March, in the year of our Lord one thousand nine hundred and nineteen.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service Accepted:
C. EDWARD WRIGHT,
Attorney for Defendant in Error.

[Endorsed:] 3196. Court of Appeals District of Columbia. Filed Mar. 31, 1919. Henry W. Hodges, Clerk.

41 Court of Appeals of the District of Columbia.

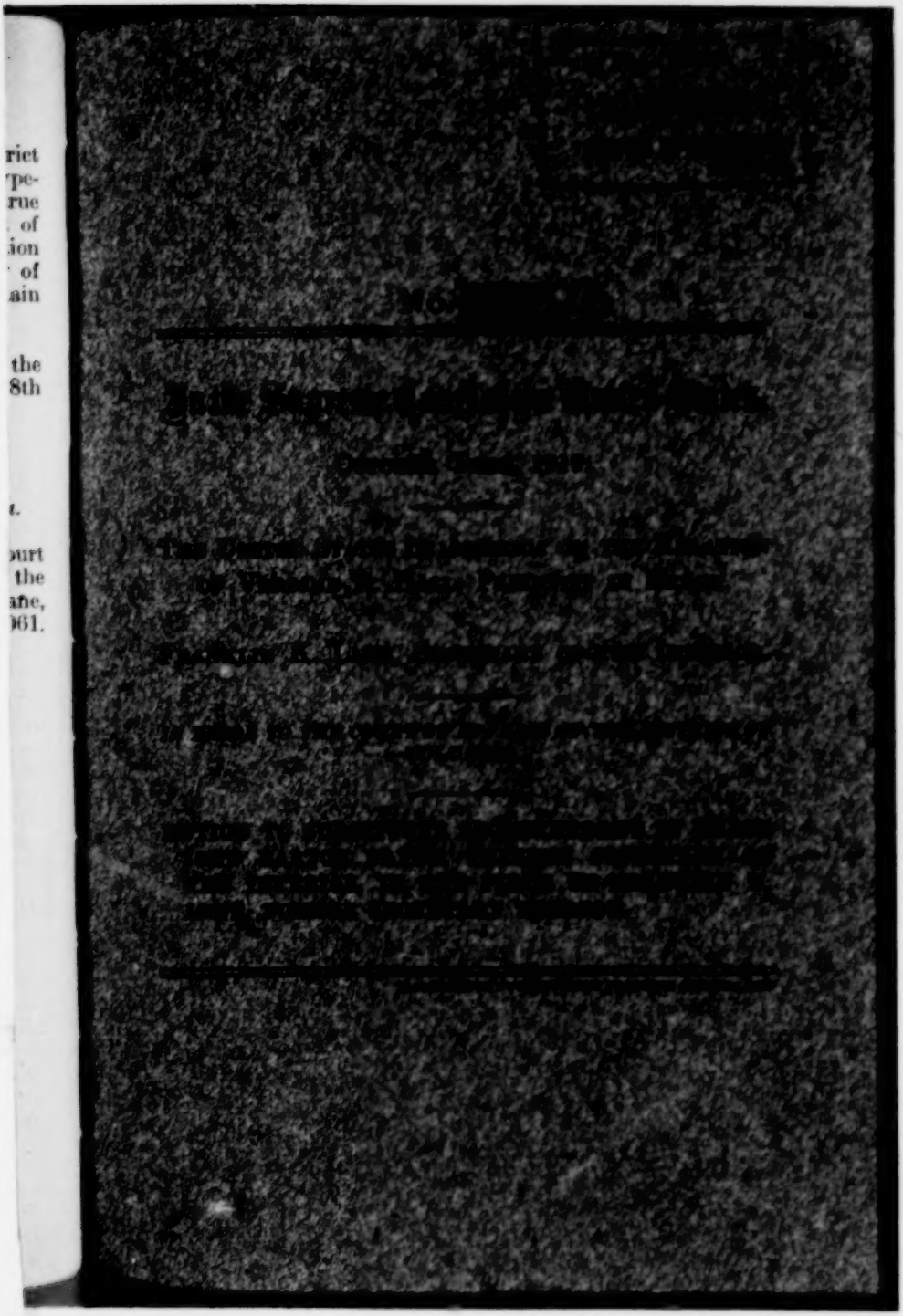
I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 40 inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of The United States of America on the relation of Verdine R. Hall, Appellant, vs. Franklin K. Lane, Secretary of the Interior, No. 3196, January Term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 8th day of April, A. D. 1919.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 27,061. District of Columbia Court of Appeals. Term No. 349. The United States of America, on the relation of Verdine R. Hall, plaintiff in error, vs. Franklin K. Lane, Secretary of the Interior. Filed April 11th, 1919. File No. 27,061.



In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA ON THE relation of Verdine R. Hall, plaintiff in error,

v.

FRANKLIN K. LANE, SECRETARY OF THE Interior.

No. 349.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO SUBSTITUTE AS DEFENDANT IN ERROR JOHN BARTON PAYNE, PRESENT SECRETARY OF THE INTERIOR, IN THE PLACE OF FRANKLIN K. LANE, FORMER SECRETARY THEREOF.

Comes now the Solicitor General, and suggesting to the court the resignation of Franklin K. Lane as Secretary of the Interior and the appointment of John Barton Payne as his successor, respectfully moves the court that said John Barton Payne, in his capacity as Secretary of the Interior, be substituted as defendant in error in this case in the place and stead of said Franklin K. Lane.

This suit was brought to obtain a writ of mandamus compelling said Lane, as Secretary of the

Interior, to reverse certain decisions made by him adverse to Hall's asserted rights and to accept his homestead application and allow him to make homestead entry for certain lands in the State of Montana.

The writ of error brings up for review the judgment of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of the District denying the writ.

As said Lane was made a party solely in his official capacity as Secretary of the Interior, it would seem that before further proceedings in the case are had there should be a substitution as suggested.

ALEX. C. KING,
Solicitor General.

MARCH, 1920.

SEP 25
JAMES D. MAHER,
CLERK.

No. 95.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, ON THE RELATION OF VERDINE R. HALL, PLAINTIFF IN ERROR,

v.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

PATRICK H. LOUGHRAN,
Mills Building,
Washington, D. C.,
Counsel for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

October Term, 1920.

THE UNITED STATES OF AMERICA, on the relation of Verdine R. Hall, *Plaintiff in Error,*

v.

JOHN BARTON PAYNE, Secretary of the Interior.

No. 95.

In Error to the Court of Appeals of the District of Columbia.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This cause is before this court on a writ of error allowed by the Court of Appeals of the District of Columbia under the 5th paragraph of section 250 of the Judicial Code which provides for the allowance of such writ "in cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question."

Mandamus to the Secretary of the Interior is the relief sought in the cause.

The facts admitted in the pleadings and the proceedings taken thereon in the Land Department and in the two courts below are here stated:

March 10, 1910, about four hundred thousand acres of the then unsurveyed public domain in the State of Montana were withdrawn and reserved in pursuance

of the provisions of the act of August 18, 1894 (28 Stat. 372, 394), to wit:

"That it shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor-General of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the Surveyor-General shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the

exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: *And provided further*, That the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships for the purpose hereinbefore provided: *And provided further*, That the governors of the several States herein named are authorized to advance money from time to time for the survey of the townships withdrawn at such United States depository as may be designated by the Commissioner of the General Land Office, and the moneys so advanced shall be reimbursable. The foregoing provisions shall be applicable to Utah when admitted as a State into the Union and a governor is duly inaugurated and acting."

The plat of township 37 north range 43 east, Montana meridian, Montana (such township being a part of the area so withdrawn, reserved and removed and excepted from the operation of the homestead laws), was filed in the local land office at Glasgow, Montana, on the 17th day of May, 1915. For sixty days thereafter the said withdrawal, reservation and suspension of operation of the homestead laws continued unimpaired.

At 9 A. M. on the 17th day of July, 1915 (said date being the sixty-first day "*from* the date of filing of the township plat" and therefore the first day *after* "the expiration of sixty days from the date of the filing of the township plat" as well as the first day "*after* the expiration of such period of sixty days") Verdine R. Hall, the plaintiff here, filed in said office at Glasgow an application for homestead entry of the south half of Section 18 of said township and range. Such appli-

cation was rejected on said date by the said office at Glasgow for the stated reason that on July 16, 1915 (before "the expiration of such period of sixty days") and during continuance of the withdrawal, reservation and suspension under the said act of 1894, the said office had advanced to an entry of the same specific tracts an application for homestead entry thereof which was filed by one George E. Kennedy on May 25, 1915, *fifty-two days before* "the expiration of sixty days from the date of the filing of the township plat" and, of course, before termination of such withdrawal, reservation and suspension under the said act of 1894. Thereafter the plaintiff filed his affidavit, corroborated by five witnesses, alleging settlement on said tracts on June 5, 1915, and continued settlement thereon until after July 17, 1915. (R. 4.)

From such rejection of his said application plaintiff appealed to the General Land Office, which affirmed the action of the local office at Glasgow. Thereafter, and on plaintiff's appeal, the Secretary of the Interior affirmed the concurring judgments below. (R. 16.) The said Secretary thereafter denied a motion for rehearing in a decision (R. 18) which contains a strange admission in view of the fact that said officer sustained an application filed during the sixty day period and denied one filed immediately upon the expiration of that period, to wit, that "no rights whatever" were acquirable when the land "was not open either for entry or settlement." A petition for exercise of the Secretary's supervisory authority was also denied. (R. 18, 19 and 20.)

Failing before the Land Department to have his right of entry of the land sustained upon his unquestioned settlement thereon when it first became subject to settlement and upon his application to enter same when it first became subject to entry, plaintiff petitioned the Supreme Court of the District of Columbia for a

writ of mandamus to compel the said Secretary to perform his ministerial duty of obeying the express mandate of Congress that (excepting such homestead claims as were initiated previous to such withdrawal, reservation and suspension and continually maintained thereafter) no lands affected by said Act of August 18, 1894, "shall be *subject* to disposal under general laws as other public lands" until after expiration of sixty days from filing of the plat of survey.

The Secretary of the Interior made answer to such petition for mandamus and alleged in defense, *inter alia*, "that the determination of all questions such as may be presented by the petition involves on his part the exercise of judgment and discretion not reviewable by any court on direct proceeding either by mandamus or in equity." (R. 13 to 15 at 15.) To such answer plaintiff filed a demurrer. (R. 21 to 23.) The cause was argued under the demurrer and submitted to the court on or about April 27, 1917. On May 13, 1918, the said Supreme Court of the District of Columbia filed its opinion (R. 24 et. seq.) in pursuance of which an order discharging the rule and dismissing the petition was entered May 13, 1918. An appeal from such order brought the merits of such petition for mandamus before the Court of Appeals of said District which, on January 6, 1919, affirmed the judgment of the said Supreme Court. (R. 32 et. seq. and 48 Appeals D. of C., 279.) Writ of error to this court was allowed March 7, 1919.

ASSIGNED ERROR UPON WHICH PLAINTIFF RELIES.

The assignment (R. 36 & 37) specifies three errors, as follows:

> I. In failing to hold and rule that by virtue of the express provisions of the Act of August 18,

1894 (28 Stat. 392), the Secretary of the Interior and all other officers of the Land Department of the United States, were deprived of authority and jurisdiction to administer the homestead laws of the United States to lands withdrawn and reserved under said act at any time before expiration of the period of sixty days following the filing of the plat of the survey of such lands in the appropriate local land office, as provided in said act.

II. In failing to hold and rule that as the said act of 1894 deprived the Land Department, and all officers thereof, of any authority to administer the homestead laws to lands withdrawn and reserved under said act until after the expiration of the said period of sixty days, it was beyond the scope of any power or duty of any officer of the Land Department to permit any one to initiate a claim under the homestead laws by the filing of an application for entry under those laws during the sixty days following the filing of the plat of survey, as provided in said act.

III. In failing to hold and rule that the authority which the Land Department assumed to exercise by permitting the initiation of claims under the homestead laws during the sixty day period was without validity because opposed to and in direct conflict with a mandate of Congress written in the said act of 1894 to the effect that the general laws, which include the homestead laws, should not be applicable until after the expiration of such sixty day period.

Reliance is made upon each of the errors alleged equally, for it is contended here, in accordance with the first error assigned, that the courts below failed to apprehend the want of authority and jurisdiction in the Land Department to entertain claims to the lands attempted to be *initiated* under the homestead laws during the period of sixty days following the filing of the plat of survey, and, in accordance with the second

error assigned, that the courts below failed to understand that the act of 1894 denied to the defendant the power to entertain an attempt at *initiation* of homestead claims during such period, and, in accordance with the third error assigned, that the courts below overlooked the fact that the act of 1894 imposed upon the defendant the mandatory and ministerial duty of rejecting outright and instantly any filing which was made in an attempt at *initiation* of a claim to the lands while they were in a state of withdrawal and reservation and subject to the "*exclusive*" right of the State.

ARGUMENT.

I.

The Relief Prayed For in the Petition for Mandamus was Not Stated with Accuracy in the Opinion by the Court of Appeals of the District of Columbia.

The appellate court below seems not to have noticed the amendment of the petition for mandamus (R. 23 and 24). If noticed, it is reasonably certain that said court would not have begun its opinion with the misstatement that plaintiff had "asked for a mandamus against the Secretary of the Interior directing him to approve the petitioner's homestead application for certain lands in Montana," etc. All the relief plaintiff prayed was that, by mandamus, the judiciary compel the defendant

> "to recall, vacate, set aside and hold for naught, in so far as consideration and adjudication in the Department of the Interior of your petitioner's claim under his said homestead settlement and application is concerned or affected thereby, that arbitrary holding and ruling under, in conformity to, and as a result of which your petitioner's said claim was rejected by said Department, namely that [a] right may be acquired under the homestead

laws to public lands of the United States during the period of a valid and complete withdrawal and reservation thereof under and in pursuance of said act (Act of August 18, 1894) and before the homestead laws are applicable to such lands, and to proceed thereafter with such further consideration of your petitioner's said claim as may be needful to due determination of its merits in the exercise of the lawful judgment and discretion of the said Secretary."

It is unbelievable that a court having actual cognizance of the relief which the plaintiff in fact did ask would doubt for an instant that the scope of the relief sought was plainly restricted to the purpose of having a public officer compelled by the judiciary to confine his acts within the limitations upon his jurisdiction and powers and to perform a mandatory and ministerial duty Congress had explicitly imposed upon him, which duty, in the instant case, was to reject outright and instantly any attempt at the *initiation* of a claim to public lands under the homestead laws which had been made at a time when such lands were withdrawn and reserved from the possibility of *initiation* of claims thereto under such laws, and thus effectuate the unmistakable will of Congress that a segregation under the act of August 18, 1894, be preserved inviolate for "the *exclusive* right of selection by the State for the aforesaid period of sixty days as herein provided for." (Italics ours.)

II

Comments in the Opinions of the Courts Below which Indicate Probable Misunderstanding of the True Character of the Case.

That we are properly in this court under the 5th paragraph of Section 250 of the Judicial Code seems to us to be unquestionable in the light of the contents of

our pleadings and of what was said in Arant *v.* Lane (245 U. S., 166), which was also a proceeding for mandamus against the Secretary of the Interior. In said case this court remarked:

> "It is not open to controversy that the judgments or decrees of the court below are not made final by Sec. 250 in cases involving the interpretation and effect of an act of Congress general in character *or the general duty or power of an officer under the law of the United States* as contradistinguished from merely local authority. American Security & Trust Co. *v.* District of Columbia, 224 U. S., 491; McGowan *v.* Parish, 228 U. S., 312; United Surety Co. *v.* American Fruit Co., 238 U. S., 140; Newman *v.* Frizzell, 238 U. S., 537." (Italics ours.)

The District of Columbia Code, Section 233, Act of March 3, 1901, C. 854, 31 Stat. 1189, 1227, while superseded by Section 250 of the Judicial Code, Act of March 3, 1911, 36 Stat. 1159, is referred to here for the reason that it conferred a right to review in this court "upon writ of error or appeal, in all cases" * * * "without regard to the sum or value of the matter in dispute," * * * "wherein" * * * "is drawn in question" * * * "an authority exercised under the United States." Said section 233 was noticed by this Court in Smoot *v.* Heyl (227 U. S., 518). We mention this case here because it seems to establish these propositions:

1st. That it is unimportant with respect to the right to review by this Court under the 5th paragraph of Section 250 of the Judicial Code whether the authority of the public officer be challenged by the plaintiff or by the defendant. If challenged at all, either party to the suit has the right to such review.

2d. That it is also unimportant with respect to such right of review, whether the Court of first instance or the intermediate appellate court did or did not decide

the question as to the validity of the authority challenged. We quote the following from Smoot *v.* Heyl, *supra:*

> "This court has jurisdiction. District Code, Sec. 233, Act of March 3, 1901, C. 854, 31 Stat. 1189, 1227; Steinmetz *v.* Allen, 192 U. S., 543, 556; McLean *v.* Denver & Rio Grande R. R. Co., 203 U. S., 38, 47, 48. As the appellees challenged the validity of the regulation if it applied to their property as was insisted by the appellant, the case was one in which there was drawn in question the validity of an authority exercised under the United States. *The question was a substantial one, and was directly presented,* its determination being required unless the appellees succeeded upon one of the other issues. To justify a review of the decision under the act governing this appeal it is sufficient if the validity of the authority is drawn in question *irrespective of the conclusion reached by the court below.* Baltimore & Potomac R. R. Co. *v.* Hopkins, 130 U. S., 210, 222. The appeal brings the entire case here. See Horner *v.* United States, No. 2, 143 U. S., 570, 577; Penn Mutual Life Ins. Co. *v.* Austin, 168 U. S., 685, 695." (Italics ours.)

As to the substantiality of the questions our pleadings present, and as indicating that those questions are not of a fine spun or merely artful character, and therefore neither seriously argued nor entitled to serious consideration, we refer to page 35 of the Record where will be found the following observation by one of the Justices of the appellate court below, viz:

> "Mr. Justice Robb concurs on the ground that appellant has an adequate remedy without resorting to the writ of mandamus; that is, he concurs in the opinion except as to the first point."

Our case then, as we submit, is not in any respect similar to Brown *v.* Lane (232 U. S., 600) wherein this court said:

"But it is elementary that where the jurisdiction depends upon the presence of controversies of a particular character or the existence of prescribed questions or conditions, substance and not mere form is the test of power and therefore even in a case where the requisite for jurisdiction formally exists the right to review does not obtain where it is evident that the formal questions as presented by the record are so wanting in substance as to cause them to be frivolous and devoid of all merit. Consolidated Turnpike Co. *v.* Norfolk, etc. Ry. Co., 228 U. S., 596, 600, and cases cited. * * * Coming to test the existence of jurisdiction to review the controversy and consequently to determine whether the writ prayed for should be allowed we are clear that the propositions upon which it is asserted jurisdiction to review exists are so wholly unsubstantial and frivolous and devoid of all merit as to afford no ground whatever for the exercise of jurisdiction and the consequent allowance of the writ."

Neither of the courts below appears to have apprehended that it is essential to *appropriation* of public lands by a State that the lands first be surveyed. While written with reference to the grant to the State of Oregon for common school purposes, the opinion of this court in United States *v.* Morrison (240 U. S., 192) makes it clear that the survey is the *sine qua non* of an *appropriation* by a State under a grant to it.

If we had been more thorough in our argument before the tribunals below neither of them would have inclined to the view, it either of them did, that a withdrawal and reservation under the act of 1894 constituted an *appropriation* to or by a State. Several years ago it was contended before the Land Department, by the State of Idaho, that lands within such withdrawals and reservations were not within the reach of the Executive for inclusion in national forests in pursuance of the act of March 3, 1891 (26 Stat. 1103). The stated basis for

such contention was that an application by a governor of a State under the act of 1894, if perfect and producing a withdrawal and reservation under said act, constituted such a filing for the lands as gave the State the status in law of an appropriator thereof. The question was discussed in an opinion of the Attorney-General given January 30, 1911, which will be found in 39 L. D., 482. We quote the following therefrom:

> "In no proper sense, therefore, can the State be said to make a claim to the land described, or any part of it, prior to actual selection of specific tracts.
>
> * * * * * *
>
> "I am obliged to conclude that the legislation of 1894—notwithstanding its evident purpose to realize for the States named the bounties in land which Congress had extended to them, and notwithstanding the general language reserving the areas which they ask to have surveyed from any adverse appropriation by settlement or otherwise—was not designed to empower the State *to withdraw* public lands from the operation of the provisions of the act of 1891, to any extent or in any way not previously permissible.
>
> "The act of 1894 was evidently intended, first, to expedite the surveys, so that the lands might be identified for selection, and second, *to hold off new claimants* (who otherwise might anticipate the States), *until* the surveys had been approved and *the States had enjoyed a reasonable opportunity thereafter to make their selections.* It was intended to effect a readjustment of the relations previously existing between the States and other beneficiaries of the land laws, but not to confer upon the States any privilege which they did not already possess to precede the Government in appropriations of land. This view appears to conform entirely with the purpose of the legislation as it was understood by the executive officials who drafted it, and by the Representative who introduced and explained it in its original form (as an amendment to an appropriation bill) and explained it on the floor of the

House. (See proceedings and official correspondence, Cong. Rec., vol. 26, pt. 3, pp. 2955–2959; also Senate proceedings, ib., vol. 26, pt. 8, pp. 8020–8021.)

It being evident that a State does not make an *appropriation* when it effects a withdrawal and reservation under the act of 1894, we must look for some other entity as the appropriator whose appropriation would be attempted to be adversed by a settlement *initiated*, or by *a claim asserted* under an application filed, during the period of the withdrawal and reservation. We can see only the United States as the true appropriator during such period. We think that a settlement or application first attempted during that period must, of necessity, be impotent and nugatory for all purposes because an attempt at appropriation adverse to the appropriation made by the United States under the withdrawal and reservation.

That such appropriation by the United States is adverse to all attempted appropriation by any one during the sixty days following the filing of the plat, except the State and claimants "under rights that may be found to exist of prior inception," seems to us to be indisputable in the light of the fact that the act of 1894 expressly provides that the *general laws* shall not be applicable until *after* expiration of such sixty day period.

The Supreme Court of the District of Columbia decided against plaintiff (R. 24 *et seq.*) for the following stated reasons:

1st. That the act of August 18, 1894, conferred on the State only a *preference* right to select, notwithstanding that the word *preference* nowhere appears in said act and that the only right said act expressly conferred on the State was an "*exclusive* right of selection." (Italics ours.)

Comment: Perusal of said court's opinion will produce the conviction that the court must have forgotten what plaintiff had diligently called to its attention, in the argument, viz, that it was properly held in Kay *v.* State of Montana (34 L. D., 139, 142) that the act of March 3, 1893 (27 Stat. 593), which confers the mere "preference" right, without providing for a withdrawal and reservation, operates entirely unimpaired by the act of August 18, 1894, which not only confers the "*exclusive* right" but provides for a withdrawal and reservation to effectuate it.

2d. That the words "*until* the *expiration* of sixty days *from* the date of the filing of the township plat of survey" (italics ours) were not intended or required by Congress to be construed as the defendant had theretofore construed them (Regulations, 16 L. D., 462; Ziegler *v.* State of Idaho, 30 L. D., 1 at 3; State of Idaho *v.* Cody, 30 L. D., 79 at 81; Cronan *v.* West, 34 L. D., 301), nor agreeably to the doctrine that:

> "The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated, and to include the last day of the specified period. 'When the period allowed for doing an act,' says Mr. Chief Justice Bronson, 'is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time; and so be excluded from the computation.'" (Sheets *v.* Selden's Lessee, 2 Wall., 177, 190.)

3d. That there is presented to the judiciary only "an administrative question" within the exclusive province

of the Secretary of the Interior to determine, and therefore beyond the jurisdiction of the courts to adjudge, when it is shown in a proceeding for mandamus that said officer had, contrary to his own rulings for about a generation, suddenly and without previous notice and to the prejudice of citizens abiding such rulings, announced through the medium of a telegram to a firm of real estate dealers and public land locators (R. 6) that he had jurisdiction and power to entertain applications to *initiate* rights under the homestead laws to lands withdrawn and reserved under the act of August 18, 1894.

> Comment: This observation by said court proves conclusively that it received the impression from plaintiff's pleadings and argument that he was merely attempting to have the courts coerce the defendant into adherence to long observed rulings with respect to matters within his jurisdiction and power, from which he had suddenly departed. Courtesy to said court requires us to say that it was entirely our fault it did not perceive that our reference to the hitherto long observed rulings of the defendant was for the purpose of showing that *the defendant, himself, had repeatedly admitted the basis of our petition for mandamus*, to wit, that he was without jurisdiction and power to administer withdrawn and reserved lands under the homestead laws until the withdrawal and reservation had ceased and those laws had become applicable to the lands.

4th. That the defendant's decision to the effect that he had jurisdiction and power, before the general land laws became applicable to lands withdrawn and reserved under the act of August 18, 1894, to entertain homestead applications for such lands, "was an act of judgment and discretion within the scope of his authority

as Secretary of the Interior construing and administering the land laws, and in consequence his decision in this case can not be reviewed by this Court. To do that would be to convert the writ of mandamus into a writ of error."

> Comment: But it has been repeatedly held by the Supreme Court of the United States, as pointed out hereinafter, that the judgment and discretion of an administrative officer as to the scope of his jurisdiction and power may very properly be a subject of inquiry in proceedings for mandamus.

The Court of Appeals of the District of Columbia, while not committing the obvious error of stating that the act of August 18, 1894, conferred a *preference* right when, in fact, it conferred an *exclusive* right, decided against the plaintiff (R. 32 *et seq.*) because of the following stated reasons, to wit:

1st. That "it can not be correctly said that when the Secretary held that the act of Congress, forbidding adverse appropriation of the land during the sixty day period, did not prohibit the filing of an application for entry while that period lasted, he completely missed the significance of the act."

> Comment: This observation by the appellate court is especially interesting in connection with an affirmative holding by the defendant which showed he clearly apprehended "the significance of the act" to be precisely what plaintiff has ever contended. We refer to the defendant's holding in denying plaintiff's motion for rehearing (R. 18), viz., that "furthermore, Hall (plaintiff) had acquired *no rights whatever* by settling on land at a time when it *was not open either for entry or settlement.*" (Italics ours.) When land is not open for

entry, is it not obvious that it is closed to entry? If closed to entry, operation of the act of 1894 was responsible for the closing. If closed to entry under that act, entry was authoritatively interdicted thereby. If entry was interdicted, any attempt at entry also was interdicted. An application to enter is an attempt to enter. If it was the will of Congress expressed in said act that the land be closed to entry, then was not the filing of an application to enter an act by an individual in attempt at contravention of the will of Congress? How would it be possible for Congress more clearly to "prohibit the filing of an application for entry" than by closing the land to entry and, thereby, rendering it vain and idle for any one to try to enter? The closing of the land to entry was the prohibition against a subsequent filing of an application to enter. When land is closed to entry "no rights whatever" are acquired through an attempt to enter it, as was truly stated by the defendant, himself, in his holding to which we have just referred. Does it not savor of the illogical to say that while the act of 1894 forbade entry, it did not forbid, but authorized, an attempt to enter, and enabled those who made attempts to enter to acquire, as of the dates of their attempts, a *right* under a law which was not then in operation?

2d. That if "Hall (plaintiff) has a right to a writ of mandamus in this case, then every defeated litigant before the Department would have a like right. And if we admit that he would, it must be on the assumption that this Court has the power to review the decisions of the Secretary of the Interior upon an application for such a writ."

Comment: This observation by the appellate court is of a nature necessarily fully committing it

to these views: (1st) That Congress did not deny to the defendant jurisdiction and power to entertain applications to make homestead entries of lands while same were withdrawn and reserved pursuant to the act of August 18, 1894; (2d) That Congress did not impose upon defendant a mandatory and ministerial duty to preserve inviolate "the *exclusive* right of selection" conferred upon the State, and (3d) that Congress did not make it the mandatory and ministerial duty of the defendant to maintain the withdrawal and reservation created under the said act by rejecting outright and instantly any attempt to *initiate* a claim under the homestead laws before the land became enterable under those laws.

3d. That "there is another reason why the appellant has no standing in Court. If Hall's (plaintiff's) claim is sound he can, as soon as a patent has been issued to Kennedy, bring a suit in equity to have the title impressed with a trust in his favor."

Comment: This observation by the appellate court seems to us expressive of a new doctrine. If the Courts of the District of Columbia are to be absolved of the duty of entertaining a petition for mandamus against the Secretary of the Interior when functioning as a public land tribunal, in all cases where said officer seems intent upon patenting to John Doe a tract of land to which Richard Roe is entitled, because Roe can maintain a suit in equity against Doe upon the same cause of action he would have against the Secretary of the Interior for refusal (1st) to desist from assuming to exercise an authority he does not possess and (2d) to perform a ministerial duty, then, we say, an entirely novel principle or doctrine has been recently enunciated. A holding that mandamus is not

plaintiff's appropriate remedy, solely because the relator would have the right, in event of issue of patent for the land to another, to institute a suit to have the patentee declared a trustee of the title upon the grounds and for the reasons alleged in the instant proceeding for mandamus against the Secretary of the Interior, would, if permitted to take root in our jurisprudence, not only operate to deny a hearing in the Courts of the District of Columbia to many citizens who feel that their rights have been disregarded through arbitrary conduct on the part of the Land Department but strike down the only existing restraint on an officer of the Government doing for Doe what he is under a ministerial duty to do for Roe. It would be a crime against natural justice, to say nothing of its being repugnant to every acceptable theory and sound principle of our national life, if our judiciary were to hold that there are some circumstances in which a public officer may freely and with entire immunity from even the possibility of judicial restraint substitute his will for the will of his creator, the Congress.

It seems to us that the appellate court below ventured an expression of views entirely the opposite of those expressed by this court in the following excerpt from the United States *v.* Schurz (102 U. S., 378 at 404), which was a suit for mandamus, to wit:

"If the relator in this case can not obtain his patent, he is wholly without remedy. He can not sue the United States, in whom is the title in the absence of the patent; for the United States can be sued in no other court than the Court of Claims, and we have decided that that court has no jurisdiction in such a case. Bonner *v.* United States, 9 Wall. 156. There is no one else to sue, for the title is either in the relator or the United States.

It may be many years before the city of Grantsville, the party now claiming against him, will get a patent, and it may never do so. (Italics ours.)

"The relator is, therefore, utterly without remedy, if the land be rightfully his, until he can obtain possession of this evidence of his title.

"On the other hand, when he obtains this possession, if there be any equitable reason why, as against the government, he should not have it,—if it has been issued without authority of law, or by mistake of facts, or by fraud of the grantee,—the United States can, by a bill in chancery, have a decree annulling the patent, or possibly a writ of *scire facias*. *If another party (as the city of Grantsville) is, for any of the reasons cognizable in a court of equity, entitled, as against the relator, to have the title which the patent conveys to him, a court of chancery can give similar relief to the city as soon as the patent comes into his possession, or perhaps before.* So that it is plain that by non-action of the Land Department the legal rights of the parties may remain indefinitely undecided, and those of the relator seriously embarrassed or totally defeated, while the delivery of the patent, under the writ of mandamus, opens to all the parties the portals of the courts where their rights can be judicially determined. (Italics ours.)

The case of Ballinger *v.* Frost (216 U. S., 240) is another in which a writ of mandamus issued to the Secretary of the Interior, regardless of the claims adverse to the petitioner therefor which were being asserted with respect to the same land by others in and before the Land Department.

In Lane *v.* Watts, 234 U. S., 525, 540, which was an equity proceeding against Franklin K. Lane, Secretary of the Interior, it was urged on behalf of the Secretary that the courts were without jurisdiction because "the citizens of Tubac Township are necessary parties" owing to claims which were being asserted by them in and before

the Land Department. In that case the court remarked that "the suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of the appellees. This disposes of the contentions of appellants that "* * * there is a defect of parties, or that the suit is an attempted" * * * "trial of a title to land not situated within the jurisdiction of the court."

III

There Should Be No Doubt that Mandamus is an Appropriate Remedy Where the Secretary of the Interior Has Acted Beyond Statutory Limitations Upon His Jurisdiction and has Assumed to Exercise Discretion when Deprived of Discretionary Power.

We submit that a litigant is not justly chargeable with having attempted to make a proceeding for mandamus serve the purpose of a writ of error, when it is obvious that such proceeding was not brought with view to having the judiciary correct an alleged error of judgment committed in the exercise of a power by a public officer which the litigant admits such officer possessed, but was brought with view solely to having it adjudged whether the power the public officer assumed to exercise was one which had been denied to him by Congress. Had the courts below truly sensed the issue before them as one requiring an opinion only as to whether the power to entertain a homestead claim attempted to be *initiated* during the period of a withdrawal and reservation under the act of August 18, 1894, was a power said act had denied to the Land Department, and dismissed plaintiff's petition because of opinions to the effect that such power had not been denied, and stopped there, instead of expressing views

imputing to a litigant and his counsel the blunder of attempting to convert a writ of mandamus into a writ of error, they would not only have given judgments on the only question presented to them but preserved counsel's reputation against the reflection that he was without enough learning in the law to distinguish review under writ of error from the limited judicial inquiry permissible in a proceeding for mandamus.

Whatever may be the views of any court on the question whether the plaintiff is duly entitled to the writ he is seeking, it can not be said by any one who is in fact familiar with his pleadings that they were not drawn in the belief, at least, a belief for which some reason existed, that he was presenting to the judiciary a case to which the principles announced in Noble *v.* Union River Logging Railroad (147 U. S., 165, at 171 and 172) were applicable, to wit:

> "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the Head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in Board of Liquidation *v.* McComb, 92 U. S., 531, 541: 'But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation can not be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other.'"

While it is possible we are mistaken in supposing that the defendant did not have the power to entertain applications to *initiate* rights under the homestead laws during the sixty days following the filing of the plat of survey, and also that in said period the lands were beyond his jurisdiction for administration of them except under the State's "*exclusive* right" and "*under* rights that may be found to exist of prior inception," as we think the act of 1894 very clearly provides, a mistake by us to that extent furnishes no warrant for a statement from any source that we were endeavoring to accomplish in a proceeding for mandamus something beyond the scope of the remedy of mandamus as stated in the following excerpt from Garfield *v.* Goldsby (211 U. S., 249, at 261 and 262), to wit:

> "It is insisted that mandamus is not the proper remedy in cases such as the one now under consideration. But we are of opinion that mandamus may issue if the Secretary of the Interior has acted wholly without authority of law. Since Marbury *v.* Madison, 1 Cranch, 137, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial, or are undertaken entirely without authority, which may become the subject of review in the courts.
>
> * * * * * * *
>
> "In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions there is no place in our constitutional system for the exercise of arbitrary power, *and if the Secretary*

has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." (Italics ours.)

As the act of 1894 is plainly a special statute depriving the Secretary of the Interior of jurisdiction to administer lands under the homestead laws, and forbidding him to exercise any power whatsoever with respect to them under those laws while the withdrawal and reservation continue, we submit that his ministerial duty is to reject any filing under those laws made during the withdrawal and reservation. If our contentions be sound, then what was said in United States ex rel Dunlap *v.* Black (128 U. S., 40) is applicable, to wit:

> "The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; *but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them.*" (Italics ours.)

The expression of the reasoning of this court in Kansas City So. Ry. *v.* Interstate Commerce Commission, decided March 8, 1920 (252 U. S., 178, 187, advance sheets), which was a proceeding for mandamus, would be a fit expression of reasoning by it in this case if the word "Commission" were deleted and the words "the Secretary of the Interior" substituted therefor, provided, of course, the Court were of opinion that the defendant's conduct was not deserving of characterization in stronger terms.

> "We are of opinion, however, that, considering the face of the statute and the reasoning of the

> Commission, it results that the conclusion of the Commission was erroneous, *an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess.*" (Italics ours.)

Of course it was of the power and duty of the Secretary of the Interior to consider what was meant by the act of August 18, 1894. Any public officer who has had imposed upon him by Congress a mandatory and ministerial duty or who has, by Congress, been denied the power to perform a certain act during a specified period is expected and required to look to and examine the statute prescribing such duty and taking away or denying such power. Unless he peruses the written expression of the will of Congress with respect to him and his functions, unless he reads the mandate to him, a public servant, from the people, his master, acting through the agency of Congress, he disregards the compass and chart furnished him for his guidance in performing his part in orderly government.

But it does not follow that because a public officer must read the instructions Congress has given him as to his jurisdiction and powers that he may transcend or exceed them wilfully or ignorantly, without possibility of restraint upon him through the process of mandamus or injunction. The scope of a public officer's jurisdiction and powers are not to be determined with reference to his judgment and discretion as to their scope, for his judgment and discretion are limited by his jurisdiction and power, and he is without judgment and discretion to perform a given act if such act is beyond his jurisdiction and power to perform.

What this Court said in Roberts *v.* United States (176 U. S., 211 at 231) and reaffirmed in Lane *v.* Hog-

lund (244 U. S., 174 at 181) is illustrative of the doctrine which we are endeavoring to have recognized as applicable to the case at bar. In said cited case this court said:

> "As quite apposite we excerpt the following from the unanimous opinion in Roberts *v.* United States, *supra*, p. 231:
>
> "'Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.'"

When the law in a case is positive and unmistakable, so clear and free from doubt as to preclude the possibility of question, a public officer may not openly disregard it and make himself immune to the process of justice by merely pleading that "I exercised judgment and discretion." The prerogatives of no officer of the United States Government render it possible for him to strike down the unmistakable law, to disregard its plain mandate and to shield himself in so doing by donning the armor of the plea made in this case, namely, "I exercised judgment and discretion." That armor is supplied executive officers for protection against invasion by the judiciary in the legitimate field of public service of the executive department of the government. It is not an armor rendering public officers invulnerable to the processes of the judiciary when the acts of the public officers are so plainly and unmistakably at variance with established law and the obvious right of the matter as was the act of the Secretary of the Interior in the case at bar.

> "While there is some conflict of opinion as to what constitutes, strictly speaking, a ministerial duty as distinguished from a discretionary duty, and while it is not always easy to determine where the line of demarcation lies between a ministerial act and an act involving the exercise of judgment, the distinction between merely ministerial and judicial and other official acts seems to be that, *where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment the act is ministerial.*" 26 Cyc. at page 160. (Italics ours.)
>
> "While the general proposition is true that mandamus can not be employed to control the exercise of discretion, yet it is often used to correct abuses of discretion when it has been made clearly to appear that the official refusing to do the act has either not exercised his discretion at all, *or has wilfully*

chosen to act in manifest disregard of duty and the legal rights of individuals." (Italics ours.) (Sec. 1384 of Bailey on *Habeas Corpus*, etc.)

"A public officer or inferior tribunal may be guilty of so gross an abuse of discretion *or such an evasion of positive duty* as to amount to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law. In such case mandamus will afford a remedy." (Italics ours.) (Sec. 201 of Bailey on Habeas Corpus, etc.)

No officer of the United States Government possesses autocratic power. No such officer may declare "I am the State" and confer jurisdiction upon himself by merely announcing that he has it. The jurisdiction and power of the Department of the Interior as a special tribunal for the administration of the laws relating to the public domain are subjects of positive declaration of the law making power. The extent of that tribunal's jurisdiction and power is purely a question of law, and not one of fact, or of mixed law and fact. Therefore no exercise of judgment or discretion by that tribunal in passing upon the extent of its jurisdiction and power under the act of August 18, 1894, is an exercise of discretion by it in its administrative capacity. If a decision by the Land Department to the effect that it has jurisdiction and power to apply the homestead laws to land in a state of reservation under said act is not reviewable by the courts in a proceeding for mandamus, it may declare itself possessed of jurisdiction and power for the same purpose with respect to lands in any public reservation and such declaration would be beyond correction by the courts.

"But while the action of an officer clothed with a discretion is not reviewable, if exercised upon matters left to his discretion, yet his judgment *as to the extent* of his discretion under the law, and the matters on which it may be exercised, are reviewable on mandamus; and where a discretion is

abused, and made to work injustice, it may be controlled by mandamus." Spelling, Extraordinary Relief, Section 1433, pp. 1189, 1190.

In the rather recent case of Interstate Commerce Commission *v.* Humboldt Steamship Company (224 U. S., 474) the Commission had refused to act in a given matter because in its opinion it was without jursidiction. A petition for mandamus to compel it to act was granted. In approving the issue of the writ this court said:

> "The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. *Ex parte* Harding, 219 U. S., 363. But the full doctrine of that case can not be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise *quasi* judicial duties, but its functions are defined and, in the main, explicitly directed by the act creating it. It may be of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, can not be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it can not be said to exercise discretion. Give it that latitude and you give it the power to nullify its most essential duties, and how would its non-action be reviewed?"

The ever growing evident tendency on the part of administrative and executive officers of our government to indulge in the vicious supposition that their offices possess an organic or original discretionary power which it must not be presumed on or inferred from the strictly

literal meaning of subsequent legislation that it was the intention of the law makers to take away or impair, is one of the gravest of menaces to the rights of the citizen. The judiciary must check it or the future historian might be justified in paraphrasing with respect to such officers what was said by Lord Campbell, in his introduction to the lives of the Lord Chancellors of England—

> "In former times unconscientious Chancellors, talking perpetually of their conscience, have decided in a very arbitrary manner, and have exposed their jurisdiction to much odium and many sarcasms. But the preference of individual opinion to rules and precedents has long ceased; 'the doctrine of the court' is to be diligently found out and strictly followed; and the Chancellor sitting in equity is only to be considered a magistrate, to whose tribunal are assigned certain portions of forensic business, to which he is to apply a well-defined system of jurisprudence,—being under the control of fixed maxims and prior authorities, as much as the judges of the courts of common law.

IV.

When Public Lands of the United States are Withdrawn and Reserved Under the Act of August 18, 1894, they Are Appropriated, and Therefore Beyond the Jurisdiction and Power of the Secretary of the Interior to Administer Them Under the Homestead Laws.

> "However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation." (Ballinger *v.* Frost, 216 U. S., 240, 249).

The homestead laws are expressly applicable *only* to "*un*appropriated public lands." Public lands become "appropriated" when Congress withdraws and reserves them from the operation of the general laws

quite as effectually as they become "appropriated" when an individual makes a valid entry thereof. The withdrawal and reservation constitute the peculiar form of entry Congress makes when, in promotion of the public interests, it decrees that the general laws shall cease to be applicable.

While appropriated by the United States under the withdrawal and reservation, the lands were not subject to the *initiation* of claims thereto under the general laws. It is true that during the sixty days following the filing of the plat the lands were appropriable by the State in the exercise of its "exclusive right" to select, and by individuals "under rights that may be found to exist of prior inception," but they were expressly and positively not otherwise subject to filing nor to the acquisition of *rights* in and to them. That being so, what this court said in Clark *v.* Herington (186 U. S., 206 at 209) is quite apposite, to wit:

> "The act of Congress provided in terms that such sections should be subject only to entry under the homestead and preemption laws, *and the Land Department had no more power to turn one of those sections over to a railroad company than it had to grant lands in a military or Indian reservation. While the lands were within the jurisdiction of the Land Department for some purposes they were not for all. The mode of their disposal was limited, and the Land Department had no authority to ignore that limited mode and dispose of them in any other way.* This general doctrine as to the limitation of the powers of the Land Department has been affirmed by this court in many cases and under different circumstances. Wilcox *v.* Jackson, 13 Peters, 498; United States *v.* Stone, 2 Wall., 525." (Italics ours.)

It is unquestioned and unquestionable that among the "general laws" which Congress explicitly declared should not be applicable until "after the expiration of such

period of sixty days" were the homestead laws. In view of that declaration by Congress, the homestead laws, so far as the lands in question are concerned, were virtually non-existent during the sixty-day period. If non-existent during that period it was, obviously, impossible for any one to have invoked them during that period for the purpose of acquiring either a then present or prospective *right* to have the lands disposed of to him under said laws. Equally obvious must it be that, with the homestead laws non-existent during said period, the Land Department was then without power to receive or entertain applications for the lands under those laws during that period and that its mandatory and ministerial duty was to reject such applications.

> "But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title and may be challenged in an action at law. In other words, the action of the Land Department can not override the expressed will of Congress, or convey away public lands in disregard or defiance thereof. Smelting Co. *v.* Kemp, 104 U. S., 636, 646; Wright *v.* Roseberry, 121 U. S., 488, 519; Doolan *v.* Carr, 125 U. S., 618; Davis's Admr. *v.* Weibbold, 139 U. S., 507, 529; Knight *v.* U. S. Land Ass'n., 142 U. S., 161." Burfenning *v.* Chicago, St. Paul, etc., R'y., 163 U. S., 321 at 323.
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> "But we go further, and say, that whensoever a tract of land shall have been legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands." Wilcox *v.* McConnell, 13 Peters, 496, 513.
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> "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or disposal under general laws." Newhall *v.* Sanger, 92 U. S., 716.

By the term public lands is meant "lands of the United States which are open to acquisition by the qualified first comer under some one or more of the general laws—lands which are not withheld from such acquisition by any subsisting right or claim in another, *or any act of the Government.*" (Italics ours.) Opinion of the Attorney-General of the United States, expressed January 30, 1911, and appearing in 39 L. D., 482, 485.

Lands are not subject to the homestead laws when neither "unappropriated" nor "public lands" in the sense the phrase "public lands" is used in the homestead statutes. Regardless of that incontrovertible proposition the defendant has ruled that an application invoking those laws when the lands applied for are appropriated by the United States under a duly made withdrawal and reservation confers a *right* under those laws, *a right to be deemed an applicant thereunder from a a date when the lands were neither unappropriated nor public lands.*

> "There can be no such thing as the acquisition of a right of preemption, that is of a right to be preferred in the purchase of property of the United States, until such property is open for sale." The Yosemite Valley Case, 82 U. S., 77 at 91.

V.

There is No Foundation in Fact for Defendant's Ill-advised Allegation That He Construed the Act of August 18, 1894 "For The First Time" in His Decision of April 12, 1916, in Northern Pacific Railway Company v. State of Idaho (45 L. D. 37).

In his answer to plaintiff's petition (R. 14) the defendant alleged that he construed the act of August 18, 1894, "*for the first time*" (italics ours) when he rendered his decision of April 12, 1916, in Northen Pacific Railway Company *v.* State of Idaho (45 L. D., 37). This

alleged "first time" construction was announced *subsequent* to the telegram of June 5, 1915 (R. 6) to a firm of real estate dealers and land locators advising them (notwithstanding the existence at that time of a statutory withdrawal and reservation for promotion and effectuation of the State's "*exclusive* right of selection") that homestead applications filed during the sixty-day period would be entertained. While this alleged "first time construction" succored the said telegram of June 5, 1915, by giving *color* of authority for it, such "first time" construction did not, for it could not, clothe the Land Department with jurisdiction and power not possessed by it.

The appellate court below sustained a motion to strike a brief by us in which we alluded to the alleged "first time" construction as an instance of modification of the Land Department's views "under the pressure of argumentative or other influences brought to bear by the Northern Pacific Railway Company, the beneficiary of more departures from established law than perhaps all other public land claimants combined." Said appellate court interpreted that statement as an intimation "that the Land Department of the Government has been controlled in certain cases by sinister influences."

The Northern Pacific Railway Company, because of the grant to it of immense areas of the public domain and of a right to take indemnity for any lands described in the grant which are lost therefrom, is quite naturally very deeply interested in withdrawals and reservations of the public lands. It is a well known fact that said corporation's grant has not been satisfied in the sense that it has not yet actually acquired every acre Congress granted it. The policy of said company for many years has been to file its lists of selections of indemnity lands on the date of the filing of the township plats of

survey of the lands. Its diligence and zeal in that connection is shown by the facts in Northern Pacific Railway Company *v.* Smith *et al.* (31 L. D., 151) and many other cases. The facts in Northern Pacific Railway Company *v.* State of Idaho, *supra*, show that said company filed an indemnity selection list on the date, to wit, June 4, 1904, that a plat of survey was filed. In passing upon such list the Commissioner of the General Land Office took such action as caused the company to appeal to the Secretary of the Interior and to contend "that the action of the Commissioner was erroneous in rejecting the company's selection, but that it should have been suspended subject to the State's right of selection."

In September, 1910, said appeal by the company came before the Secretary of the Interior. It remained before him until April 12, 1916, nearly six years, when the Secretary sustained the company's contentions. We still deem it beyond the possibility of any argument, if confined to the meaning of a withdrawal and reservation under the act of 1894 and to the "exclusive" right conferred by that act, to demonstrate that the "general laws" are applicable to lands during a withdrawal and reservation which, as the act of 1894 expressly provides, shall "extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey." We are of opinion that what might have influenced the decision, although not stated therein, was the fact that the acts of grant to the said corporation are not properly classifiable as "general laws." No other *ratio decidendi* would be possible of understanding or of tolerant acceptance.

The Land Department's alleged "first time construction" of the act of 1894 is a bold and unblushing construction to the effect that while the act of August 18, 1894, mentioned no other right than an "exclusive right," such was not at all the right which said act conferred;

that the mere "preference right," which was conferred by the act of March 3, 1893 (27 Stat., 393), and which the States already had and now have, was the *only* right the act of 1894 created; that a withdrawal and reservation under said act are not to be understood in the light of the literary and legal signification of the words withdrawn and reserved; that the word "exclusive" in the act of 1894 was used by Congress with no intention whatever that its true literal and legal signification should be imputed to it; that the provision in said statute that the lands "shall be *reserved* upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat," was not in fact intended by Congress to effect a *reservation;* that the only purpose of the act of 1894 was to withhold lands "from any adverse appropriation" as against a selection by a State and that much could be accomplished by treating as surplusage of an entirely meaningless character the words of the act, to wit, "shall be *reserved,* " * * * "for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat" * * * "and after the expiration of such period of sixty days lands which may remain unselected by the State" * * * "shall be subject to disposal under general laws as other public lands."

The fault in the reasoning of the defendant was his failure to appreciate (*a*) that a *statutory reservation* attaches whenever the act of 1894 is duly invoked; (*b*) that it was to insure against "any adverse appropriation" that such "statutory reservation" and such "exclusive right" were provided for by the act of 1894; (*c*) that the scope and extent of the "adverse appropria-

tion" against which that statute provided was definable with reference to the absolute and mandatory injunction in the act that the lands "shall be subject to disposal under general laws as other public lands" *only* "after the expiration of such period of sixty days"; (*d*) that (as shown by citation of authority elsewhere herein) any attempt to enter lands under the general laws or to initiate a right under those laws when "any adverse appropriation" thereunder is forbidden is as much interdicted by law as the "adverse appropriation" itself; (*e*) that when lands are under a statutory reservation against appropriation under general laws for a specified period they are not in the custody or keeping of the Land Department but in the custody and keeping of Congress; (*f*) that the Land Department has no authority or power to apply the general laws to public lands *when such lands are neither in its custody or keeping nor subject to those laws.*

A statement by the public officer charged with the enforcement of the act of August 18, 1894, that he construed said statute "for the first time" about twenty-two years after its date, is naturally admitting and apt to rouse suspicion as to its accuracy. As a representation of fact it is refuted by the following proof of previous constructions of the said act by the Secretary of the Interior.

In Zeigler *v.* State of Idaho, decided May 1, 1900 (30 L. D., 1 at p. 3), the Land Department considered an application to make homestead entry which had been filed during the sixty days allowed for exercise of said States "exclusive" right under the act of August 18, 1894, and expressed these views:

> "His homestead application, tendered February 14, 1898, was during the period of *reservation* provided for in the statute and *no rights were secured thereby* nor by reason of the appeal from the rejection thereof by the local officers, as said appeal entitled him to a judgment only upon the correct-

> tion of the action taken at the time of the presentation of the applications." (Italics ours.)

Was not the foregoing a construction of the act of 1894? Was it not an expression of opinion that the lands were in a state of reservation against attempts to initiate rights thereto under the homestead laws *during the sixty-day period?* If not then we are ignorant of what is meant by statutory construction.

In State of Idaho *v.* Cody, decided June 23, 1900 (30 L. D., 79 at 81), it was expressly held that certain applications filed within the sixty-day period had no standing as applications filed within that period and would only "be permitted to stand as of the date of the expiration of the period of said reservation." That too was an instance of statutory construction, we think.

In Thorpe *et al. v.* State of Idaho, decided June 27, 1901 (35 L. D., 640, at 644), the Secretary of the Interior expressly endorsed the ruling of the Commissioner of the General Land Office *and sustained the contention plaintiff has ever made* that "a statutory reservation attached" after the Governor of a State had duly applied for the benefits of the act of August 18, 1894. When a public officer has deliberately, formally and publicly declared that an act of Congress may effect a "statutory reservation," is he not grievously misrepresented when he is caused, by his counsel, to say that he has not construed such act?

When a public officer is as careless about his facts as the Secretary of the Interior appears to be it is not strange to find him careless also as to the limitations upon his jurisdiction and powers.

When the Land Department notified a firm of real estate dealers and land locators, by wire, that their clientele might, with impunity and possible advantage, violate the "statutory reservation" it not only ignored previous and oft-repeated constructions of the act of

1894 but it contemned and set aside its own regulations of May 22, 1914 (43 L. D., 254). The Department has never attempted to state the reason or cause for forgetting, on the date of that wire to said firm of real estate dealers and land locators, the existence of the following paragraph of said regulations:

> "Hereafter when lands unsurveyed *or withdrawn or reserved* are to become subject to disposition under the laws applicable thereto by the filing of a township plat of survey *or by restoration to entry from such withdrawals or reservations* all applications, filings, or selections therefor may be executed in the manner required by law and, with the required fee and commissions, be presented to the proper local land office in person, by mail, *or otherwise within the period of twenty days* prior to the date of filing the township plat or of restoration to entry, *unless the law or the regulations governing the disposition of a particular application or the land affected otherwise provide*. No priority will be secured nor right forfeited by the presentation of such application, filing, or selection in the manner and within the time prescribed prior to the filing of the township plat or the restoration of the land to entry, and all such applications, filings, and selections shall, with those presented by persons present at the local office at the hour the lands become subject to entry, be held and treated as simultaneously filed." (Italics ours.)

Had the foregoing been observed, instead of disregarded, no application would have been received during the sixty-day period, as "the law" * * * "governing the disposition of" * * * "the land affected (did) otherwise provide." But even if it had been permissible, from an administrative standpoint, to disregard what "the law" * * * (did) "otherwise provide," what lawful consideration influenced the Land Department to enlarge (with respect to lands withdrawn and reserved under the act of 1894) *to sixty*

days the period of twenty days for anticipatory filing "prior to the date" * * * "of restoration," as provided in said regulation? Said regulation also provided that "no priority will be secured" * * * "by the presentation of such application" * * * "prior to" * * * "the restoration." But that provision was ignored in the Land Department's decisions against which we here complain. It also ignored the provision in said regulation, to wit, that "all such applications" * * * "shall, with those presented by persons present at the local office at the hour the lands become subject to entry, be held and treated as simultaneously filed."

Plaintiff filed his application "at the hour the lands became subject to entry" for he filed it at 9 A. M. on July 17, 1917. (R. 4) If he had filed it earlier it would have been filed within the sixty days of "exclusive right" accorded the State and, therefore, within the period of continuance of the withdrawal and reservation, for the plat was not filed until May 17, 1915. As the act of 1894 provides (1) that the withdrawal and reservation shall be "for a period to extend *from* such application for survey until the expiration of sixty days *from* the date of the filing of the township plat" and (2) that not until "*after* the expiration of such period of sixty days" shall the lands "be subject to disposal under general laws as other public lands," it is mathematically exact to say that July 17 was the date on which the general laws first became applicable.

In his answer the defendant alleged (R. 13) that said period of sixty days *began with* May 17, 1915, and *terminated with* July 15, 1915; thus defining the word "from" contrary to the meaning in which it is held by all humanity and imputing to the word "after" a meaning the opposite of "subsequently to," etc. His computation neither comports with this Court's views on such matters, as set out in Sheets *v.* Selden's Lessee, *supra*,

nor with his own views expressed elsewhere. Paragraph 1 of his Regulations respecting selections by the States (16 L. D., 462) provides for "the day of filing (of the plat) to be excluded in computing said period." In Zeigler *v.* State of Idaho (30 L. D., 1 at p. 3), the plat of survey being filed January 25, 1898, the Land Department held, excluding the date of filing, that the right granted the State expired March 26, 1898. In State of Idaho *v.* Cody (30 L. D., 79 at 81), the plat of survey being filed January 10, 1898, the Land Department held, excluding the date of filing, that "March 11, 1898" * * * "was the sixtieth day after the filing of the township plat of survey." In Cronan *v.* West, *et al* (34 L. D., 301), the plat of survey being filed August 21, 1903, the Land Department held, excluding the date of the filing, that "as August has thirty-one days, the State's preference right expired October 20th."

From the monster error of usurpation of jurisdiction and power by a public officer it is inevitable that there should spring a large progeny of reptiles of crude misrepresentation or clumsy blundering. Attempts at defense of usurpation are usually futile as well as proof of the wilful spirit of the usurper.

VI

Defendant's Rulings are Incongruous in Addition to Being Expressions of a Fixed Purpose to Assume Jurisdiction and Exercise Power Contrary to the Will of Congress.

Before discussing the decisions rendered by the Department of the Interior on plaintiff's claim under his settlement and application, the contents of the defendant's answer to the petition for mandamus should be further adverted to, as therein are discoverable several matters indicative of his evident determination to go so far as even to cause this court, if that be humanly

possible, not only to acquit him of the charge of arbitrary conduct but to approve his last, but not his first, construction of the act of 1894 as being the only construction compatible with its intent. He says in his answer that the State exercised its *exclusive* right on June 5, 1915. The Court should not infer from said averment that on said date the State waived its right to make further selections within its exclusive right period extending to and including all of July 16, 1915. So far as the defendant or any of his subordinate officers or employees knew to the contrary, the selection the State made on June 4, 1915 was only one of a series of selections the State had decided to make within said period and on each day within the period. If there had been a formal waiver by the State on June 4, 1915, and such waiver had been regarded as operating to cause the general laws to become applicable to the lands on that date or the following date, instead of at the expiration of sixty days from date of filing of the plat, there would have been an allowance on June 4 or 5 of the application filed May 25, 1915 and not a postponement of its allowance until a date the Register believed to be beyond the sixty day period. If there had been such waiver the defendant would have set it up in his answer and not have sought to impress the judiciary with the motion that June 4th, 1915 was the date of termination of the State's period of exclusive right, through a tacit understanding. *The State's action or non-action within the sixty day period, so far as the matter of selections by it is concerned, could not shorten, no more than it could extend, the period of "statutory reservation" from the operation of the general laws provided for in the act of 1894.*

Even if it could be sensibly said that the reservation came to an end with June 4, 1915, it would not follow that the application for homestead entry which was filed May 25, 1915, *and instantly and properly rejected on that date,* was resurrected and became a live and

valid application on the former date because of some act by the State done on that date. It is fundamental, a truism, as pointed out hereinbefore, that an application to enter lands reserved from entry is invalid, void, and therefore not an application at all in contemplation of the law.

In defendant's answer appears the statement that the withdrawal and reservation "was from other appropriation as against the right of the State to select." When it is realized that said statement was made by an officer whose sworn duty it is to faithfully execute the will of Congress, and whose intelligence, supplemented by the wide and profound learning of a group of advisers in an expensively maintained governmental establishment, is of an order enabling him to perform his duties in conscientious observance of that oath, is it not actually shocking to read allegations by him that bear all the indicia of an admission that he did not and does not know that *the withdrawal and reservation were from appropriation as against the United States under any of its general laws until expiration of the sixty day period? The defendant should know that the right of the State to select was not existent until after the filing of the plats, as hereinbefore pointed out.* He should know that the withdrawal and reservation were effective before the filing of the plats, *and therefore before there was any right in the State to select.* He should know that before the filing of the plats and the accruing of the right in the State to select, the withdrawal and reservation were effective against all appropriation "except under rights that may be found to exist of prior inception." He should know that said stated exception was the only exception until the filing of the plats when, as the act provides, the exception was enlarged to include the then accruing right of the state to select. He should know that during the sixty day period the lands were withdrawn and reserved except as against the State and claims "found

to exist of prior inception." We believe the defendant knew well all those patent facts, as we believe it to have been impossible for him not to have known them. We believe that he knew well also that the general laws were not applicable until expiration of the sixty day period. To our mind it borders on the most extravagant of extravagances for the defendant to attempt to persuade any one to believe that his enlightened judgment and discretion had persuaded him that the general laws were applicable during the sixty day period and that *rights* under those laws could be *initiated* during that period.

The defendant well knows that he is without authority to create the conditions under which a *contingent right* in and to public lands may be acquired, *a right to enter as of a date within the period of the exclusive right of another provided such exclusive right be not exercised.* He well knows that if Congress had intended that an individual might *initiate* such contingent or conditional right within the sixty day period that Congress would have expressly prescribed the conditions for the acquisition of such right and not have declared that *only* rights of "prior inception" and the State's right of selection were *excepted* from the withdrawal and reservation that continued during the sixty day period. He well knows, or should well know, that his ruling that *rights* under the general laws may be *initiated* during the sixty day period is not only tantamount to an attempt by him to *legislate* another exception to the withdrawal and reservation during said period, but is wilful disobedience of the injunction Congress laid upon him to stay the taking of jurisdiction over the lands and the exercising of administrative functions with respect thereto under the general laws until the said period of sixty days had fully expired.

In defendant's decisions on the appeal and the motion for rehearing, respectively, he chose to state that plaintiff was contending that his claim to the land

attached on the date he made settlement thereon, to wit, June 5, 1915, which was during the period of the withdrawal, reservation and suspension. To that extent the plaintiff was misrepresented or misunderstood by the defendant. But it is not a rare occurrence for the Land Department to overlook, misstate, misrepresent or ignore even its own rulings, as indicated hereinbefore. It was not until rendition of defendant's decision on the petition for exercise of his supervisory authority that he chose to state and discuss the precise contention always presented to and made before him by plaintiff, viz, that neither by settlement nor by application to enter, if *initiated* during the sixty day period, could any one acquire a valid claim under the homestead laws and, also, that the defendant was without jurisdiction or power during such period to entertain an asserted claim under those laws which had been attempted to be initiated within that period.

While the three decisions rendered by the defendant are rested upon the same stated grounds, they are inharmonious in their reasoning, as we will point out hereinafter. The concluding words of the decision denying the plaintiff's petition for exercise of the supervisory authority of the Secretary of the Interior are representative of the character of reasoning that preceded the conclusions announced in all three decisions, to wit,

> "Kennedy's application is admittedly prior in time to Hall's settlement and he is accordingly prior in *right.*" (Italics ours.) (R. 21.)

Thus, as we submit, did the Secretary of the Interior thrice assert that a "*right*" could be acquired to public lands under the homestead laws during a period when, by an act of Congress, the lands were removed and excepted from the operation of those laws. Thus, as we submit, did the Secretary of the Interior assume a

jurisdiction and power he d[illegible] not possess, viz, jurisdiction over the lands to administer them under the homestead laws and power to entertain applications for the *initiation* of rights under those laws when the lands were reserved and withdrawn by Congress from the operation thereof. Thus, as we submit, did the defendant thrice disregard the following provisions and mandates of the act of 1894, to wit, (1st) that the State's right to select during the sixty day period should be "exclusive," (2d) that the lands should be administered as in a state of withdrawal and reservation against initiation of claims under the homestead laws, until expiration of sixty days after filing of the plats of survey and (3d) that "any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands" *only* "after the expiration of such period of sixty days." Thus, as we submit, did the Secretary of the Interior assume to accord to a "sooner" public land claimant a *right* over a law abiding citizen who was the first applicant and the only actual settler after it became lawful to apply and to settle.

While the conclusions of the three decisions of the defendant were the same, an observation he made in his decision denying the motion for rehearing (R. 18) is significant of his imperfect and inharmonious reasoning. In that decision he said:

> "Furthermore, Hall (plaintiff) had acquired no rights whatever by settling on land at a time when it was not open either for entry or settlement."

That was true. It was what Hall not only admitted but contended. That was the crux of Hall's case, the foundation, keystone and entire structure thereof. Unfortunately for Hall, as well as for the repute of the decisions of the Department of the Interior in public land cases, the full logic of that observation appears not

to have been appreciated, certainly it was not applied, by the officer who made it.

As it was true that "no rights whatever" could be acquired under a settlement made within the period of the withdrawal, reservation and suspension, it was true also that "no rights whatever" could be acquired by the filing during that period of an application to enter. There was perfect agreement between the plaintiff and the land department that the land in question "was not open either for entry or settlement" during such period. But before that postulate of public land jurisprudence was stated, the Land Department, in its decision on the appeal, (R. 17) held that "Kennedy's application being prior in time, is also prior in *right.*" (Italics ours.) In its final decision (R. 19, 20 and 21 at 21) the Land Department announced again that "Kennedy's application is admittedly prior in time to Hall's settlement and he is accordingly prior in *right.*" (Italics ours.) It seems that promises may be absolute verities without also being guarantees against untenable deductions, for if "Hall had acquired no rights whatever by settling on the land at a time when it was not open either for entry or settlement," what reason exists for saying that Kennedy could acquire a *right* under a filing for the land which was made "when it was not open either for entry or settlement"? *It is inconceivable in the light of the foregoing that any one should fail to perceive that the Land Department has held that a "right" under the homestead laws is acquirable when those laws are not operative and "when it (the land sought) was not open either for entry or settlement." That holding, per se, is, we submit, sufficient for all the purposes of plaintiff's* action.

> "But there is nothing in all this which even by implication authorizes the entry of, *or the initiation of entry proceedings so as to acquire any rights thereunder, for lands not at that time subject to entry.*
>
> "*That this can not be done may be asserted as a*

fundamental principle in the administration of the land laws as old as the system itself. It is a matter of history that originally all who went upon the public lands might be treated as intruders and removed by force if necessary. In the course of time this rule was modified for the benefit of actual settlers with improvements. The modification, however, only went to the extent of giving the settler a preferred right to make entry of the particular tract within a stated time after the land became subject to disposal under the general land laws. But no rights are recognized as vested, because of such settlement. Authorities need not be cited for this statement, because the Department and the courts have invariably asserted the rule. And in all the decisions bearing upon the subject it is distinctly held that a right to acquire title to lands can only be initiated after they become subject to entry or sale. In the case of Lansdale *v.* Daniel, 100 U. S., p. 113, 166–7, a settler upon the land filed preemption declaratory statement therefor prior to the time when the plat of survey was filed in the local office, and the court decided that such filing was an absolute nullity, the law allowing such filing only after the plats of survey were returned; and the land was awarded in that case to one who filed his declaratory statement more than two years afterwards.

"Entry under the homestead law is the initiation of a right to acquire final title to land subject to such entry by a subsequent compliance with the requirements of law. As a condition precedent to the making of such entry, the applicant must file an affidavit showing his qualifications, etc. Unquestionably the entry can not be made prior to the time when the land becomes subject to disposal, and following the case of Lansdale *v.* Daniels, supra, such an entry would be a nullity. *By a parity of reasoning the application, and papers on which it was made, must likewise be null, void,* and of no effect whatever, simply because they were made for the purpose of initiating a right, which, if acquired, would relate back to the date of initiation,

and cut off intervening claims; *thus establishing a right as of a date when, under the law, no such right could be acquired.* And this has been the distinct holding of this Department in many cases. (Ramage *v.* Maloney, 1 L. D., 461; Wydler *v.* Keeler, 13 L. D., 288; Reed *v.* Buffington, 12 L. D., 220, 224; Mills *v.* Daly, 17 L. D., 345–6; and Ady *v.* Boyle, ibid, 529, and other cases which might be cited)." (Italics ours.) Smith *v.* Malone, 18 L. D., 482 at pp. 485–6.

The views set out in the foregoing quoted matter remain unchanged and unaffected by any subsequent ruling and fit perfectly into the views expressed and maintained by the Land Department with respect to the meaning of the act of 1894 for nearly a generation before the defendant's alleged "first time" construction.

That an anticipatory application, a "sooner's" application, is incapable of obtaining any right whatever under the public land laws for him who files it is settled law. But one case need be cited, to wit, Lansdale *v.* Daniels (100 U. S., 113 at pp. 116 and 117):

"System and order are essential in administering the land offices, and if a party may anticipate the time for such an act as prescribed by law for two months, it is not perceived why he may not for two years, or even for a longer period, which would necessarily introduce confusion, uncertainty, and irregularity of practice in the local offices of the Land Department. For these reasons the court is of the opinion that *the declaratory statement filed by the defendant is inoperative and without any legal effect.* Daniels *v.* Lansdale, 43 Cal. 41; 1 Lester's Land Laws, 400; Copp's Land Laws, 420.

"He filed his declaratory statement more than two months before the return of the plats of survey, and in direct violation of the law upon the subject, which required it to be filed within three months after such return, as appears from the explicit language of the act; nor can the court relieve the

defendant from the consequences of his failure to comply with the express requirement.

* * * * * * *

"Grant that, but it only shows that both parties settled upon the land while it was unsurveyed, and that each was to some extent in fault in filing his declaratory statement, *the difference being that the defendant filed his before he had any right to file it under the pre-emption act, which rendered it a nullity*, and that the plaintiff did not file the required notice of claim until the time allowed by the amendatory act had expired. *Such a notice, if given before the time allowed by law, is a nullity.*" (Italics ours).

All precedent was as if suddenly forgotten or despised when the General Land Office resolved to ignore the injunction against administration of the lands under the general laws during the period they were withdrawn and reserved therefrom. It was apparently forgotten that a party who files for land when it is reserved from filing must, if he desires to assert a valid claim, file a new application after the reservation has ceased, and that such new application shall not relate back to the date of the inhibited filing. (Shadbolt *v.* St. Paul, Minneapolis and Manitoba Ry. Co., 14 L. D., 613). It was apparently repellant, as something despised, that—

"*The uniform ruling* of the Department has been that an application to enter land in reservation for any purpose confers no right upon the applicant, and that an appeal from the rejection of such application does not operate to save or create rights not secured by the application itself. (Maggie Laird, 13 L. D., 502.)

"True, it has been held that applications to enter land in reservation may be allowed, in the event the lands so applied for are restored to settlement and entry, after due investigation; but this is only where the question is one between the applicant and the government, *and has never been done so far as I*

am advised, in the presence of a valid, intervening adverse claim." (Italics ours.) William Cuer, 25 L. D., 95 at 97.

Despite his holding in Zeigler *v.* State of Idaho, *supra*, that an application to enter which is filed when (as he held in Thorpe *et al. v.* State of Idaho, *supra*), "a statutory reservation attached," must be rejected; despite what he said in Smith *v.* Malone, *supra*, as to "a fundamental principle in the administration of the land laws as old as the system itself"; despite what this court has said in the numerous cases and regulations hereinbefore cited, the defendant blandly asserts, and challenges the judiciary in a proceeding for mandamus to question the assertion, that he has jurisdiction and power during a "statutory reservation" of public lands from the operation of the homestead laws to administer the lands under those laws.

> "But if those officers acted without authority; if the land which they purported to convey had never been within their control, *or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void* • • • ." (Italics ours.) Doolan *v.* Carr, 125 U. S., 618, at 625.
>
> "'No man in this country,' this court has said, 'is so high that he is above the law. No office. of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' United States *v.* Lee, 106 U. S., 196, 220." Burton *v.* United States, 202 U. S., 344 at 368.
>
> "The powers of the executive officers of England are not vested in the executive officers of the United States government, simply because they are called by similar names. It is the theory, and I may add, the glory of our institutions, that they are founded upon law, that no one can exercise any authority

over the rights and interests of others except pursuant to and in the manner authorized by law.

"In the case of The Floyd Acceptances, 7 Wall. 666, 676, speaking of the powers of an officer of the government—in that case of the Secretary of War—this court said: 'When this inquiry arises, where are we to look for the authority of the officer? The answer which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President, down to the most subordinate agent, who does not hold office under the law, with prescribed duties and *limited authority*.'" (Italics ours.) United States *v.* San Jacinto Tin Co., 125 U. S., 273 at 307–8.

If it is elementary and fundamental that in cases where there is no room for the exercise of discretion, the acts of an administrative officer may be controlled by mandamus, if "there can be no intent of a statute not expressed in its words" (Sutherland on Statutory Construction, 2d Ed. Sec. 3888), if "the intent of the law must be sought in the language of the statute itself" (Ib. Sec. 366), if "where a statute is clear and free from all ambiguity the letter of it is not to be disregarded in favor of a mere presumption as to what is the policy of the government, even though it may be the settled practice of the Department" (S. P. M. & M. Ry. Co. *v.* Phelps, 137 U. S., 528), if "when the language of an act is so clear and explicit as not to be open to construction, its construction can not be changed by the practice of the Department however long continued" (United States *v.* Graham, 110 U. S., 219), if "every clause in a statute should have effect and one portion should not be placed in antagonism to another" (United States *v.* Landram, 118 U. S. 85), may we not confidently say of the act of August 18, 1894, that all of its possible mean-

ing pertinent to this proceeding is understandable with accuracy without the aid of Departmental or other construction and is lucidly expressed in the simple, plain, unmistakable, doubt-free, self-defining, and self-proving language of that act. As the language of the statute of 1894 renders it as plain, aye, as palpable, as the existence of Deity, that lands withdrawn and reserved under the act of 1894 are not public lands open to the *initiation* of rights thereto under the homestead laws during the continuance of the withdrawal and reservation, and are not lands within the jurisdiction of the Land Department for the administration of them under those laws, may a public officer actually confess such infirmities of judgment and discretion as disable him to perceive those obvious facts and, by reason of such confession alone, become immune from performance of the obligation to see it, to observe it and to respect it under the compulsion of a writ of mandamus?

VII

The Public was Betrayed and Injured by the Land Department's Arbitrariness.

The act of 1894 provides that the withdrawal and reservation shall not attach unless the Governor of the State causes to be published, for thirty days, a "notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for." It also provides "that the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided."

The fact that approximately 400,000 acres were affected by the particular withdrawal and reservation

referred to in the instant case, sufficed to rouse public interest. The lands withdrawn and reserved were desirable from the standpoint of intending homesteaders. It was reasonably certain that the State would not exercise its "exclusive right" with respect to all of them. Therefore many persons who would, if opportunity afforded, make homestead entry of areas remaining unselected by the State sought advice as to when such areas would become appropriable under that character of entry. They and their counsel quite naturally first turned to the statute under which the withdrawal and reservation had been made for such advice. They found therein the provision that during the State's "exclusive right" period only selections by the States and filings in maintenance of "rights that may be found to exist of prior inception" were permissible. That was not all they found for their reading of the act apprized them of the fact that the lands would "be subject to disposal under the general laws as other public lands" *only* "after expiration of such period of sixty days."

The act was not the sole source of information to intending homesteaders as to the time they might lawfully attempt to initiate claims under the homestead laws. The decisions of the Land Department in Ziegler *v.* State of Idaho, *supra*, in Thorpe et al. *v.* State of Idaho, *supra*, announced the existence of a "statutory reservation" when the act of 1894 became operative and that "no rights were secured" by a "premature application to make homestead entry" and that an application was premature if filed during the period of the State's "exclusive right." Moreover attorneys, United States Commissioners and other persons and officers to whom intending homesteaders apply for advice and guidance knew of the Regulations of May 22, 1914, *supra*, and, of course, advised in consonance with the terms thereof.

We should feel less indignation at the telegram of

June 4, 1915, from the General Land Office to the Otto M. Christensen Land Company advising them, in effect, that *the act of 1894 had ceased to be deemed authority for what it expressly affirmed* and that the holdings in decisions and regulations referred to in the preceding paragraphs were no longer entitled to respect, if the startling information it imparted had not been confined to that enterprising aggregation of real estate dealers and public land locators. We submit that it was an assault upon the law by an officer sworn to respect it for the Commissioner of the General Land Office, before having the Secretary of the Interior expressly recall as authority the decisions and regulations cited in the preceding paragraph hereof, to have advised any one that he might, under the protection of the Land Department, perform an act in derogation of an express mandate of Congress. Persons who depended upon a great Department of the Government to administer the law in accordance with its unmistakable terms were very much hurt by the Land Department's rather irregular and confidential manner of encouraging "soonerism," irregular and confidential because the Otto M. Christensen Land Company received notice, by wire, of the disregard by the said Department of said act, decisions and regulations in advance of notice to the Register and Receiver at Glasgow, Montana. In this connection the court should notice the fact (R. 6 and 7) that until June 4, 1915, the Register and Receiver were uniformly rejecting, as they should, every application to initiate a right under the homestead laws which was filed during continuance of what the Secretary of the Interior declared in Thorpe et al. *v.* State of Idaho was a "statutory reservation." The Court should notice the further fact that in his answer the defendant "admits that until June 5, 1915, such construction of the law may have been entertained by local land officers, and even by the Commissioner of the General Land Office." (R. 14.)

By entertaining applications filed during the sixty day period, the Land Department encourages and induces precisely that which the author of this brief has been informed has frequently occurred, viz, the making of attempts to procure from persons in the confidence of the State information as to the lands it would not select in the exercise of its "exclusive right." By declaring the general laws not applicable until expiration of the sixty day period Congress provided, so far as federal legislation could provide, against the advantage of knowledge in advance of expiration of that period as to the lands not to be selected by the State. Congress sought to place all intending homesteaders and others desirous of invoking the general laws upon an equality both with respect to opportunity to file and knowledge as to the lands the State had permitted to remain unselected by it. This intended equality of opportunity to all can not exist if the Land Department persists along the absurd course of telling the public it may file within the sixty day period and thus gamble on the chance that its filing will not be defeated by a selection made by the State.

When alleged administrative discretion is exercised by the Land Department as it was exercised on behalf of the "sooners," when the plain and unmistakable meaning of an act of Congress, in accordance with which and authoritative decisions and regulations thereunder the public has shaped its course, is ignored and disregarded, as it was ignored and disregarded through substitution of a Departmental ordained course of procedure for a cause of procedure prescribed and defined in a mandate from Congress, have we not presented an instance of wrong with respect to which what was said in Daniels *v.* Wagner (237 U. S., 547, 558) is applicable, to wit:

> "And it becomes moreover certain that the necessary result of this assertion is the following: That

> although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation."

Plaintiff was a settler on the land at the moment it became subject to disposal under general laws. He had been such settler for a considerable period theretofore, but, as we have shown hereinbefore, never claimed a *right* from any date other than the date the general laws became applicable and effective. His *right* as a settler attached the instant the sixty day period expired. At that instant he was opposed only by a person claiming under an application which, as shown by citation of authority hereinbefore, was null and void. A null and void adverse application of record at the instant the reservation ceased, although "suspended" after due rejection, or the existence at that time of an entry which was null and void because allowed on an application filed within the period of the "statutory reservation," could not, of course, defeat plaintiff's settlement claim.

In the case of Moss *v.* Dowman (175 U. S., 413, 417), this court said:

> * * * "the question is as to the relative rights, at the moment the land becomes open to entry, of one a settler in actual occupation and one making a formal entry in the land office. For reasons heretofore stated we have no doubt the settler is entitled to preference."

Ignorance or wilful disregard by the Secretary of the Interior of the limitations upon his jurisdiction and power over lands withdrawn and reserved from the *initiation* of claims thereto under the homestead laws, necessarily involved ignorance or disregard by him of the right of plaintiff under the act of May 14, 1880, *supra*, as the first and only actual settler upon the land at the time it became subject to the operation of the homestead statutes. The latter disregard of law and arbitrary rejection of a citizen's senior right as a homestead settler was an inevitable corollary or consequence of the wilful refusal of the defendant to respect the "statutory reservation" which he, himself, in the due exercise of his lawful judgment and discretion, declared in Thorpe *et al. v.* State of Idaho, *supra*, "attached" whenever the act of August 18, 1894, was invoked by one of the States.

CONCLUSION

The sentiments of counsel for the plaintiff in this proceeding are of the nature of the sentiments expressed in the speech of Lord Erskine in defense of the Dean of St. Asaph. In the course of that speech the eloquent Erskine said:

> "* * * for although, in ordinary cases, where the private right of the party is alone in discussion, and no general consequences can follow from the decision, the advocate and the private man ought in sound discretion to be kept asunder; yet there are occasions, when such separation would be treachery and meanness. In a case where the dearest rights of society are involved in the resistance of a prosecution, where the party accused is, as in this instance, but a mere name, where the whole community is wounded through his sides, and where the conviction of the private individual is the subversion or surrender of public privileges, the advocate has a more extensive charge. The duty

> of the patriot citizen then mixes itself with his obligation to his client, and he disgraces himself, disgraces his profession, and betrays his country, if he does not step forth in his personal character, and vindicate the rights of all his fellow-citizens, which are attacked through the medium of the man he is defending."

We submit that the concurring judgments of the courts below proceeded from deliberations which failed to take account ot these propositions, to wit:

1st. That the prescribing of conditions to the attachment of a *contingent right* or any right to public lands when they are in a state of withdrawal and reservation is essentially a legislative matter;

2d. That Congress has never prescribed the conditions under which such *contingent right* can be acquired;

3d. That there was a usurpation of jurisdiction by the Secretary of the Interior over lands withdrawn and reserved from the general laws when he permitted and encouraged filings upon such lands under such laws;

4th. That there was an assumption of power the Secretary of the Interior did not possess when he ruled that lands withdrawn and reserved under the act of 1894 are, while withdrawn and reserved, subject to administration under the general laws;

5th. That such usurpation and such assumption by the Secretary of the Interior eventuated in his illogical and wholly indefensible ruling that while "no rights whatever" are acquired by attempts at settlement upon lands when they are withdrawn and reserved, nevertheless an application to enter such lands when they are "not open either for settlement or entry" will, after restoration of the lands to the public domain, render the claimant under such application "prior in right" from the date of the filing of his application.

We submit that the concurring judgments below are

erroneous and should, therefore, be reversed by this court upon the ground and for the reason that plaintiff has shown that he has been denied a right under the laws of the United States through an arbitrary ruling by the Secretary of the Interior to the effect that he has not only the authority to disregard a "statutory reservation" of public lands but jurisdiction over lands expressly withdrawn and reserved from the general laws to administer such lands under such laws.

Respectfully submitted:

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Washington, D. C.
Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA, ON THE relation of Verdine R. Hall, plaintiff in error,
v.
JOHN BARTON PAYNE, SECRETARY OF THE Interior.
} No. 349.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error, Hall, filed a petition in the Supreme Court of the District of Columbia, praying for the issuance of a writ of mandamus to compel the Secretary of the Interior to recall and reverse certain decisions made by him adverse to Hall's asserted rights and, in essence, to accept Hall's application and allow him to make homestead entry of certain land in the State of Montana.

It appears that the land in question, with other lands, had been withdrawn or reserved on March 23, 1910, by the Commissioner of the General Land

Office pursuant to the provisions of the Act of August 18, 1894 (28 Stat. 372, 394, ch. 301, sec. 1; U. S. Comp. Stat. 1916, sec. 4876, page 5870), to preserve the lands subject to the claim of the State of Montana, from the date of the withdrawal until sixty days after the filing of the plat of survey in the local land office for the district in which the lands were situated.

The plat of survey of the township in which the land in controversy was located was filed in the Glasgow, Montana, land office on May 17, 1915. On July 17, 1915, the relator Hall tendered at the land office an application to make homestead entry for this tract. This was rejected by the local land officers because in conflict with a prior homestead application of one Kennedy, which had been placed of record the day before, July 16, 1915.

It appears that Kennedy's application had been first tendered on May 25, 1915, and had been rejected by the officials of the Glasgow office because the land was not subject to entry within the sixty-day period. Subsequently, upon instructions from the Commissioner of the General Land Office, the local officers changed their ruling and held the application suspended to await action by the State. At the expiration of the sixty-day period, the application was allowed.

From this action rejecting his application, relator Hall prosecuted an appeal to the Commissioner of

the General Land Office, contending that the allowance of Kennedy's entry was in disregard of the provisions of the Act of August 18, 1894, *supra*, which he asserted contemplated an absolute withdrawal of the lands; that the action in permitting the application to remain suspended instead of rejecting it was unauthorized in view of said withdrawal; and further that his, Hall's, application was the first one presented after the expiration of the sixty-day period, prior to which time the Land Department had no power to accept or receive applications to enter the lands withdrawn.

The Commissioner affirmed the action of the local officers in rejecting Hall's application, and the Secretary of the Interior did likewise upon appeal to him (R. 16–17). A motion for rehearing (R. 18) and later for the exercise of supervisory power were denied (R. 19–21).

The basis of the petition for mandamus (R. 1–12) appears to be an alleged want of jurisdiction and power of the Land Department to entertain Kennedy's application during the period of withdrawal in disregard of the requirements of the Act of August 18, 1894, and the prejudice to the relator because of an alleged change of policy on the part of the Department with respect to action upon applications tendered within the sixty-day period.

In the return to the rule to show cause the Secretary of the Interior averred in substance that the entry of Kennedy had been properly allowed,

it being the only one pending at the expiration of the sixty-day period which he fixed at July 16, 1915. He denied that there had been any ruling of the Department contrary to that made in this case relative to the disposition of filings tendered for lands reserved for the benefit of a State. While admitting that there might, prior to that ruling, have been a contrary holding by district land officers and even the Commissioner of the General Land Office, he averred that since August 31, 1910, a case involving the question as to the right secured to a State under this Act during the sixty-day period had been pending before him on appeal; that that case had been decided April 12, 1916, and that this decision constituted the first construction of the Act by the Department; that the proper construction of the Act of August 18, 1894, was that the reservation for the sixty-day period conferred upon the State a preference right but did not affect rights of other parties as between each other, and that during that period applications of others than the State could be received and held suspended to abide selection by the State.

It was further alleged that the construction of the Act, as well as a determination of the rights of the parties, is within his jurisdiction so long as legal title to the land remains in the United States; that legal title still is in the United States; and that the determination made by him of the questions raised called for the exercise of judgment and discretion on his part and was not reviewable by the courts.

A demurrer to the answer was overruled, and the relator electing to stand on his demurrer, judgment dismissing the rule and petition was entered (R. 27).

Upon appeal, the Court of Appeals affirmed that judgment (R. 35). Opinion of Supreme Court of the District of Columbia (R. 24–27); Court of Appeals (R. 32–35).

Whereupon the relator sued out this writ of error.

ARGUMENT.

I.

The decision of the land department was made in the exercise of judgment and discretion and is not reviewable by the courts.

Both courts below found that the decision of the Secretary of the Interior, the correctness of which was challenged by relator and of which he seeks a reversal, was made in the exercise of judgment and discretion on a matter within his jurisdiction and hence ruled that the courts were without power to review it. Clearly, that view of the case was correct.

The question of the respective rights of Hall and Kennedy under their applications was one which called for the exercise of judgment and discretion on the part of the Secretary. The courts below found that his decision was not arbitrary or capricious, and the Supreme Court of the District went further and held that the Secretary's construction of the Act of August 18, 1894, was entirely permissible, and, in effect, approved it.

In such a situation, it is well established that mandamus will not be awarded. The writ cannot be used as a substitute for a writ of error, and it will not issue to control the judgment or discretion of an executive officer in a matter within his jurisdiction. Regardless of whether the court would reach the same decision were the question presented to it originally, it will not substitute its judgment for that of the executive officer. *Ness* v. *Fisher*, 223 U. S. 683, 691; *Knight* v. *Lane*, 228 U. S. 6, 13; *Louisiana* v. *McAdoo*, 234 U. S. 627, 633.

To escape the force and effect of this well settled principle, relator asserts that by reason of the provisions of the Act of August 18, 1894, the Secretary had no power to receive applications during the sixty-day period. But the assertion of want of power could be made in practically every case where coercion of the Secretary's judgment was sought. He surely had power to determine the rights of the relator Hall on the latter's application to make homestead entry of the land, and, because to detemine those rights it was necessary to construe a statute, the decision of the Secretary is none the less binding.

Furthermore, the legal title to the land involved herein is still in the United States and the disposition thereof still under the control of the Secretary of the Interior. In such a situation the courts will not interfere. The remedy must be sought after patent issues. *Minnesota* v. *Lane*, 247 U. S. 243, 249, 250.

II.

Even if properly reviewable, the decision of the Secretary was correct and should not be disturbed.

The Act of August 18, 1894, so far as applicable here, provided (pp. 394, 395):

> That it shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several Acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor-General of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the Surveyor-General shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist or prior inception, for a period to extend from such application for survey until the expiration of sixty days from the

> date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, * * * ; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands.

The contention of the petitioner, that the action of the Land Department in receiving and suspending instead of rejecting Kennedy's application to enter the land was contrary to its previous rulings and adjudications, is not borne out by the record.

The first authoritative ruling on that particular point was that contained in *Northern Pacific Ry. Co.* v. *State of Idaho*, decided April 12, 1916, reported in 45 Land Decisions, page 37. It was there held (syllabus):

> A railroad indemnity selection filed during the preference-right period of sixty days from the date of the filing of the township plat accorded the State by the Act of August 18, 1894, within which to make selection, should not be rejected but received and held suspended until final adjudication of the rights of the State under any selection filed by it during the preference-right period.

Speaking of the Act of August 18, 1894, and of the Act of March 3, 1893 (27 Stat. 572, 592, 593, ch. 208;

U. S. Comp. Stat. 1916, sec. 4877, p. 5871, to which the Act of 1894 was a supplement), the Department said (p. 39):

> Taking the two acts together it is clear that their purpose was to secure to the State the period of sixty days within which the State should have a right to select the land superior to all others. The act of March 3, 1893, speaks of this as a preference right. The act of August 18, 1894, directs that the land shall be reserved "from any adverse appropriation."

Clearly this is a fair and entirely consistent construction of the Act. The purpose of that Act was to preserve and protect the rights of the State. By granting preference right to the State all its rights were protected and the purpose of the Act was fulfilled. Whatever action was taken by the Land Department with reference to filings of others for lands so withdrawn, it was of no consequence to the State not was it any of its concern, *provided they were not allowed to interfere with the right of the State* under the Act of Congress.

What effect the action of the Land Department might have upon individuals is an entirely different matter and is without the scope or purview of the act. Whether the rights of the State were fully protected is not open to question by others than the State, neither is the correctness of the construction of the act which, beyond question, was solely for the benefit of the States affected thereby.

CONCLUSION.

It follows that the judgment of the Court of Appeals was right and should be affirmed.

Respectfully submitted.

FRANK K. NEBEKER,
Assistant Attorney General.
H. L. UNDERWOOD,
Special Assistant to the Attorney General.

APRIL, 1920.

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UNITED STATES ON THE RELATION OF HALL *v.* PAYNE, SECRETARY OF THE INTERIOR.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 95. Argued November 17, 1920.—Decided December 13, 1920.

Whether a homestead right can be initiated by filing an application while the land is reserved to give opportunity for lieu selections by a State, under the Act of 1894, 28 Stat. 394, is a question involving a

construction of that statute which the Secretary of the Interior must decide in determining between such applicant and one who was in possession and made application when the period for state selection expired; and mandamus will not lie to control the Secretary's decision. P. 347.

48 App. D. C. 279, affirmed.

THE case is stated in the opinion.

Mr. Patrick H. Loughran for plaintiff in error.

Mr. Assistant Attorney General Nebeker, with whom *Mr. H. L. Underwood*, Special Assistant to the Attorney General, was on the brief, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case involves the consideration of a mandamus brought by plaintiff in error, hereinafter called relator, against the Secretary of the Interior.

The proceedings were instituted in the Supreme Court of the District of Columbia by petition and its essential allegations stated narratively are as follows:

The lands in question are within a township which was reserved under an act passed August 18, 1894, c. 301, 28 Stat. 394, from adverse appropriation by settlement or otherwise except under rights found to exist of prior inception, for a period to extend from the application for survey until the expiration of sixty days from the date of the filing of the township plat of the survey in the proper district land office.

The plat of the survey was filed in the proper district land office May 17, 1915. During the sixty-day period, nor since, the described land has not been selected by the State. On June 5, 1915, the relator settled on the land and on July 17, 1915, was still actually residing thereon

with the *bona fide* intention and purpose of appropriating and entering it under the homestead laws of the United States, in the event that the State of Montana did not select the same in accordance with the statute.

On the latter date, relator filed in the Land Office, perfect application for the land as a homestead which the Register and Receiver rejected for the stated reason that on July 16, 1915, they had permitted one George E. Kennedy to make a homestead entry of the lands.

The permission for the entry of Kennedy rested wholly upon an application made May 25, 1915, at a time when the lands were reserved as before stated.

On May 25, 1915, the Register and Receiver rejected Kennedy's application in the following terms: "Rejected May 25, 1915, because land not open to entry until July 17, 1915, except to State of Montana and settlers prior to March 10, 1910."

On June 4, 1915, the Register and Receiver made the following notation upon Kennedy's application: "Suspended June 4, 1915, pending preference right of State of Montana. Rejection of May 25, 1915, hereby revoked."

Theretofore it had been the consistent and uniform practice of the General Land Office to reject any and all filings such as Kennedy's.

Relator appealed from the rejection of his application to the General Land Office and that office affirmed the decision of the Register and Receiver, and relator appealed to the Secretary of the Interior who on July 28, 1916, affirmed the decision of the General Land Office and held that "Kennedy's application being prior in time, is also prior in right."

The Secretary in his decision did not refer to any of the asserted prior decisions or practice, but arbitrarily disregarded the mandate and will of Congress expressed in the Act of August 18, 1894.

Relator at the moment of the expiration of the sixty-day

limit was actually residing on the land with the intention of making entry thereof under the homestead laws, and the right to make such entry after the sixty-day period was secured to him by such residence by the provisions of the third section of the Act of May 14, 1880, c. 89, 21 Stat. 140, and the uniform decisions of the Department of the Interior under said act, and the Secretary of the Interior has arbitrarily denied to him the exercise and enjoyment of that right. And in ruling that Kennedy had acquired a right under the homestead laws relator is deprived of the benefit to him of performance by the Secretary of the Interior of a purely ministerial duty, and he prays that a writ of mandamus be issued, directed to the Secretary to approve his, the relator's application, and deliver to him the proper evidence thereof. General relief is also prayed.

An order to show cause against the petition was issued and served on the Secretary to which he made reply affirming the legality of the action of the local land office, and the decision of the General Land Office affirming it, and his decision of concurrence.

He denies that there had been any ruling by the Secretary of the Interior that during the sixty-day period application for homestead entry must be rejected. Such, however, he admits, may have been the ruling by the local land office and even by the Commissioner of the General Land Office, but he stated that from August 31, 1910, the construction of the act was pending before the Secretary upon an appeal from a decision of the Commissioner, that a decision upon said appeal is reported in 45 L. D. 37, under the title *of Northern Pacific Ry. Co.* v. *Idaho*, dated April 12, 1916, and that he decided that selections during such period should not be rejected but held suspended until final adjudication of the rights of the State.

He avers that such is the proper construction of the act, and that the act being one of the land laws of the United States, its construction, as well as the determination of all

equitable rights of parties under it, is within the jurisdiction of the Secretary of the Interior so long as the legal title of the land yet remains in the United States, (and that it appears on the face of relator's petition that the legal title of the land in controversy is still in the United States,) and involves the exercise of judgment and discretion, not reviewable by any court on direct proceeding either by mandamus or in equity.

He prays that the rule to show cause be discharged.

Relator demurred to the return and in passing upon it the court observed that there were two questions in the case, one, whether the facts exhibited a case for mandamus of the Secretary, that is, "in apparent defiance of the law, acting capriciously or arbitrarily or beyond the scope of the administrative authority confided to him," the other, the construction of the Act of 1894.

To the first question the court answered negatively, and to the second question replied, that "independently of the question of the propriety of a review of the action of the Secretary of the Interior in the pending case, it would seem that the decision rendered by him was one entirely permissible under the law." The demurrer to the return was therefore overruled. Relator electing to stand upon it, the rule was discharged and the petition dismissed.

This action was affirmed by the Court of Appeals.

It is manifest from this statement that the petition presents a controversy over the true construction of the Act of 1894. From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. The direction of the act that the lands be reserved "from any adverse appropriation" means necessarily an appropriation adverse to the State, and this gives color to the Secretary's view. He could not administer or apply the act without construing

it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683.

We need not consider the fact that Kennedy, whose application was sustained, is not a party to the petition (see *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578); nor need we consider whether a more appropriate remedy will be open to the relator. See *Brown* v. *Hitchcock*, 173 U. S. 473; *Minnesota* v. *Lane*, 247 U. S. 243, 249, 250.

Judgment affirmed.